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A-526

Administrative Appeal

No.

- 1) Administrative Review Application
- 2) Receipt of Application Fee
- 3) Petitioner's Statement, November 22, 2006
- 4) Letter to Scott Copeland, RST Development from Fred Felton, November 8, 2006  
(with attachments)
- 5) List of Adjoining and Confronting Property Owners
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- 7) Letter to Board of Appeals from David Podolsky, December 21, 2006
- 8) Motion to Dismiss Appeal
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- 19) E-mail to David Podolsky from Caroline Seiden, December 27, 2006
- 20) Letter to Caroline Seiden from Robert R. Harris, Holland & Knight LLP, January 2, 2007
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- 23) Pre-Hearing Statement of Respondent – The City of Gaithersburg
- 24) July 6, 2006 electronic mail from Sara McLaughlin, RST, indicating date of final vacancy
- 25) Ordinance No. O-2-65, including parking requirements applicable when site plan was approved
- 26) Ordinance No. O-13-80, amending parking requirements
- 27) Current parking requirements, Section 24-219, City of Gaithersburg Zoning Ordinance
- 28) Final Site Plan, S-236, approved October 7, 1970

## BOARD OF APPEALS

ADMINISTRATIVE REVIEW  
APPLICATION

In accordance with Chapter 24, Article VII, Section 24-187 thru 190 of the City Code

Application No.	<u>A-526</u>
Date Filed	<u>11/22/06</u>
BOA Hearing	<u>Jan. 11, 2007</u>
Decision	_____
Date of Decision	_____
Opinion Rendered	_____

SUBJECT PROPERTY West Deer Park ApartmentsADDRESS 70 West Deer Park Road ZONING CLASSIFICATION R-20LOT Parcel BLOCK \_\_\_\_\_ SUBDIVISION KRA-GARR Gardens

A

APPLICANT RST Development, LLC TELEPHONE 301/816-4242ADDRESS 6001 Montrose Road, Suite 710, Rockville, MD 20852*If there are co-applicants, provide additional sheet(s) with names, addresses and phone numbers.*

## NATURE OF APPLICATION

Briefly describe application request **referencing appropriate section of City Code.**

Appeal of Determination by City Attorney and Planning and Code Administration requiring approval of Site Plan Amendment for reoccupation of existing dwellings pursuant to Sections 24-56, 24-17, 24-18, 24-19, 24-20 and 24-168 (see attached Statement for further information)

List case numbers of all applications filed within the past three (3) years pertaining to any portion of subject property.

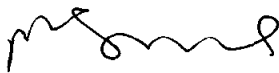
SP-05-0010

## SUBMISSION REQUIREMENTS

1. **A written statement** explaining the grievance to the Board of Appeals and outlining the history of both applicant's and City's actions in regards to the subject property.
2. **Supporting documentation**, see list on reverse side.
3. **Fees**, see separate schedule.
4. **Transcript costs** (to be charged after completion).

I have read and complied with the submission requirements and affirm that all statements contained herein are true and correct.

Signature \_\_\_\_\_



Date \_\_\_\_\_

11/22/06*If there are co-applicants, attach additional signature page(s) with signatures and printed names and addresses.*

## SUBMISSION CHECKLIST

In accordance with Chapter 24, Article VII, Section 24-188(3) of the City Code

1. ☐ **Written statement explaining grievance** and outlining histories of both petitioner's and City's action in regards to subject parcel. This statement should demonstrate why, in the petitioner's opinion, the Planning Commission and/or Staff decision in question was in error.
2. ☐ **The action, document, and all records** upon which the appeal is filed or based. (Files of a Planning Commission action shall be submitted by Planning Commission Staff following the filing of an Administrative Review.)
3. ☐ **Copy of official zoning vicinity map** with a one-thousand-foot radius (circle) surrounding the subject property and other information to indicate the general conditions of use and existing improvements on adjoining and confronting properties. (Zoning maps available from the Planning and Code Administration.)
4. ☐ **List of names and addresses of adjoining and confronting property owners or occupants** within two hundred (200) feet of the subject property; if such property is a condominium, cooperative or is owned by a homeowners' association the petitioner must provide their correct address and that of their resident agent. (Information can be researched in the Planning and Code Administration.)
5. ☐ **A list of names and addresses of persons whom you wish to be notified of the public hearing**, other than adjacent property owners.
6. ☐ **Required fee.** (Check where applicable. See fee schedule.)
  - ☐ Planning Commission Decision
  - ☐ Staff Decision
7. ☐ **Cost of transcripts.** (Transcript costs are billed in accordance with fee schedule.)

## CRITERIA

In accordance with Chapter 24, Article VII, Section 24-189(a) of the City Code

The Board of Appeals may grant a petition for Administrative Review when findings from the evidence of record that final order, requirement, decision or determination which is the subject of the appeal was clearly erroneous or not in accordance with the law.

**Please note:** Section 24-188(f) of the City Code stipulates that appeals alleging error by the Planning Commission shall be by oral argument or written statement based **solely** on evidence submitted and received in the Planning Commission proceedings.



*Gaithersburg*  
A CHARACTER COUNTS! CITY

CITY OF GAITHERSBURG  
31 SOUTH SUMMIT AVENUE, GAITHERSBURG, MARYLAND 20877  
301-258-6330

# RECEIPT

FROM	<u>RST III LLC</u>
NAME	
ADDRESS	
FOR	<u>West Deer Park</u>
	<u>Admin Review</u>
✓ 2154	TOTAL AMOUNT
DATE <u>11 22 06</u>	\$ <u>1,660</u> -
BY <u>ag</u>	

09/04

MISCELLANEOUS PAYMENT RECPT#: 36247  
CITY OF GAITHERSBURG  
31 SOUTH SUMMIT AVE.  
GAITHERSBURG MD 20877-2098

DATE: 12/01/06 TIME: 11:06  
CLERK: pwoodruf 1  
CUSTOMER#:

PARCEL:

CHG: MISC OTHER MISCELLAN 1000.00

REVENUE:

1 100 441300 1000.00

ZONING/SUBDIVISION FEES

REF1: REF2:

CASH:

001 101000 CASH-BANK OF

1000.00 PAID AMT

100 PAID BY NAME  
RST PETTY CAS PAY METHOD  
CHECK

2154

AMT TENDERED: A-526 BOA

AMT APPLIED: 1000.00

CHANGE: 1000.00



Gaithersburg  
A CHARACTER COUNTS! CITY

CITY OF GAITHERSBURG  
31 SOUTH SUMMIT AVENUE, GAITHERSBURG, MARYLAND 20877  
301-258-6330

# RECEIPT

FROM

RST III LLC

NAME

ADDRESS

FOR

West Deer Park  
Admin Review

✓ 2154

TOTAL AMOUNT

\$ 1,000 -

DATE

11-22-06

BY

ag

09/04

**BEFORE THE BOARD OF APPEALS  
FOR THE CITY OF GAITHERSBURG, MARYLAND  
APPEAL CHARGING ERROR IN  
ADMINISTRATIVE ACTION OR DETERMINATION**

COMES NOW, RST Development, LLC, by its attorneys, and submits the following appeal:


**STATEMENT OF THE CASE**

RST Development, LLC ("RST"), is the owner of certain land and improvements located at 70 West Deer Park Road, Gaithersburg, Maryland and known as West Deer Park Apartments (the "Property"). The Property is classified in the R-20 zone (medium density residential) and is developed with multi-family residential buildings that contain 198 dwelling units. These units have been operated as rental apartments since their construction in 1973.

RST purchased the Property in 2005 and obtained Site Development Approval from the Planning Commission for the redevelopment of the Property with 130 townhouse units on January 4, 2006 (the "Approval"). Nevertheless, significant declines in the residential housing market and increases in the costs of construction have impacted such redevelopment. As an alternative to redevelopment, RST has proposed to renovate the existing structures on the Property to allow for the continued operation of the existing buildings as rental apartments in accordance with an existing use and occupancy permit and an existing rental license. The proposed renovation work includes the installation of new cabinets, carpeting and other improvements and does not otherwise involve structural modifications, changes in the overall number of dwelling units, or increases in the exterior dimensions of, or usable space within, the existing buildings.

RST reviewed the proposed renovations with City Staff, who initially indicated that new approvals from the Planning Commission would not be required. As such, RST arranged for contractors to commence this work. Subsequently, City Staff determined that the work would require new approvals. As set forth in a letter from the Assistant City Manager to RST dated November 8, 2006, the City Attorney for the City of Gaithersburg, acting on behalf of the Planning and Code Administration, determined that RST would be required to file a Site Development Plan Amendment and obtain approval from the Planning Commission prior to resuming the occupation of the existing buildings on the Property for rental purposes. In further discussions, City Staff have revealed that this decision is based on the belief that the continued use of the existing development on the Property for rental apartments would now constitute a non-conforming use.

RST respectfully disagrees with this determination by City Staff and therefore is appealing the decision of the City Attorney and the Planning and Code Administration set forth in the letter dated November 8, 2006. With this appeal, RST seeks to preserve its rights to continue using the Property for rental apartment purposes.





## **DISCUSSION AND ARGUMENTS**

Based on various provisions of Chapter 24 of the Code of the City of Gaithersburg (the "Zoning Ordinance"), RST believes that the determination of the City Attorney and the Planning and Code Administration as set forth in the letter dated November 8, 2006, is clearly erroneous. Pursuant to Section 24-56, which identifies the uses permitted in the R-20 zone, multi-family residential uses and accessory uses such as off-street parking are permitted by right. Rental apartment uses have always been permitted on the Property under the standards of the R-20 zone, and the continuation of such uses would likewise be permitted under the Zoning Ordinance. The proposed renovation work on the Property does not involve any enlargement, increase, movement or structural alteration of the existing buildings. RST is simply proposing to renovate the existing structures. Therefore, pursuant to Sections 24-17, 24-18 and 24-19, the provisions applicable to non-conforming uses do not apply. In addition, Section 24-20 allows renovation and repair work to occur even on non-conforming uses where such work does not exceed 10% of the current replacement value of the structure. The proposed work does not exceed that amount.

Finally, pursuant to Section 24-168, there is no contemplated erection, movement, addition or structural alteration to the buildings that would require a Site Development Plan Amendment. As previously stated, RST is simply upgrading the existing structures.

## **REQUEST FOR RELIEF**

We respectfully request that the Board of Appeals reverse the determination of the City Attorney and the Planning and Code Administration that a Site Development Plan Amendment is required for the continued use of the Property for rental apartments and any other related determinations by City Staff.

Respectfully submitted,  
HOLLAND & KNIGHT, LLP

By: 

Robert R. Harris, Esq.  
Holland & Knight, LLP  
3 Bethesda Metro Center  
Suite 800  
Bethesda, MD 20814

Date: November 22, 2006

# 4204008\_v1



November 8, 2006

Mr. Scott Copeland  
RST Development, LLC  
6001 Montrose Road  
Suite 710  
Rockville, MD 20852

Dear Mr. Copeland:

As discussed during our October 23, 2006 meeting and reiterated during our telephone conversations on November 3, 2006, the City Attorney's office has determined that you must obtain approval for site plan amendment from the Planning Commission prior to being permitted to reoccupy the existing dwellings at West Deer Park Apartments.

In response to your inquiry concerning submission requirements, Greg Ossont, the Director of Planning and Code Administration, has provided you with the attached clarification on submission requirements. As we discussed, if you disagree with Mr. Ossont's position on the submission requirements, please outline your objection in writing and I will discuss the issue with the City Attorney and provide you with a written response as expeditiously as possible.

If you should have any questions or wish to discuss this matter, please feel free to contact me at 301-258-6310.

Sincerely,

Frederick J. Felton  
Assistant City Manager

fj/fms  
Enclosure

cc: David B. Humpton, City Manager  
Cathy G. Borten, City Attorney  
Greg Ossont, Director of Planning and Code Administration

City of Gaithersburg • 31 South Summit Avenue, Gaithersburg, Maryland 20877-2098  
301-258-6300 • FAX 301-948-6149 • TTY 301-258-6430 • cityhall@gaithersburgmd.gov • www.gaithersburgmd.gov

MAYOR  
Sidney A. Katz

COUNCIL MEMBERS  
Stanley J. Alster  
Geraldine E. Edens  
Henry F. Manafila, Jr.  
John B. Schlichting  
Michael A. Sesma

CITY MANAGER  
David B. Humpton

1. Should we use the NRI/FSD that we did for the townhome development concept? If so, does it need to be submitted "at least 30 days prior to submittal of concept plan reviews, site plan, and schematic development plans (SDP)" as outlined in the Site Development Checklist? Or, can we submit it with our application on 11/9/2006?

**NRI/FSD is good for three years, however, you and scott recently indicated an underground stream or spring which will need to be included/incorporated.**

2. Do we need to pay all Site Plan Review Fees? Are they all applicable since the structures are existing and we are not proposing any new construction or changes to the existing and therefore no review is required?

**Yes.**

3. We are assuming the LEED project checklist section is "Not Applicable".

**Yes. The checklist is required.**

4. Will a copy of the existing ALTA survey and the parking plan showing existing buildings and site layout suffice for "Final site plan prints" requested in #3 of the Final Review page? And, will it suffice for any requirements regarding location, dimensions, proposed appearance of the buildings, structures and grounds?

**No. The final site plan must comply with the checklist. Also, makes sure you include sidewalk and other pedestrian/ADA required connections, etc.**

5. Will a copy of the existing ALTA survey, topographic survey (existing) and the parking plan showing existing buildings and site layout suffice for "Tentative locations, dimensions, and heights of all buildings, driveways, access, parking, easements, contours (existing at 2 ft. intervals), green spaces and play areas, sidewalks, rights-of-way, proposed streets per City master plan, zoning data, and density requirements." as requested in section 11 of the Concept Review checklist? Will it suffice for Preliminary and Final Review requirements to show locations of all of the above?

**No. the ALTA might be appropriate for a base concept plan, however, for Final Site plan approval you must comply with the checklist and we may need additional information upon review of your application.**

6. Do we need to provide a sketch of the existing building appearance or building elevations since we are not proposing to make any changes?

**Yes, the elevations of the proposed buildings are required. I would encourage you to enhance them as well.**

7. Will the parking and paving plan suffice for a "Proposed traffic circulation system, including curb cut locations for all street(s) and driveway(s)?"

**You need to show that the paving sections comply with the parking ordinance, the required parking area green space allotments are met and the radii etc must be shown.**

8. Since there is no change proposed to the NRI/FSD, we are assuming the Forest Conservation Plan is not applicable. Same for the Wildlife Management Plan.

**The Forest Conservation plan is required and it needs to show the calculations.**

9. Do we need to show street profiles, road paving plans and profiles or curb cuts on a plan other than the ALTA survey and paving plan since they are existing?

**You don't have any streets, no needs for profiles, it's all parking areas. Just make sure the parking area complies with green space, grade requirements. Paving plan is unknown until you provide a paving section so we can determine whether it meets code.**

10. Do we need to show "Location and square footage of open spaces and, for residential development, recreation facilities, e.g., tennis courts, tot lots, and pools since all of that is existing?"

**Yes. And the specs for the equipment.**

11. Do we need to show "Location, dimensions of, and types of walls, railings, fences."?

**Yes, of course. Doesn't the wall require repairs? Geo Tech report.**

12. Do we need to include a landscape plan?

**Of course.**

13. Do we need a "Final landscaping and recreation plan..."?

**Yes, ref. 10 & 12**

14. We are assuming the storm water management section is "Not Applicable".

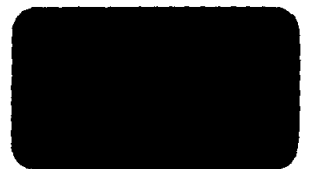
**Dependant on the amount of disturbance (< or > 5,000 sq ft.). We will check with DPW/Environmental Affairs/City Attorney to see if there is a more stringent requirement. Refer to 8-22 of the City Code.**

15. Do we need to include a "Sign package showing location and dimension of project identification, directional, and free-standing signs (and wall signage if available)." since we are not proposing a change to the existing?

**Yes. Especially if you are changing names. And all need to comply with new sign ordinance.**

**LIST OF ADJOINING AND CONFRONTING PROPERTY OWNERS****RST DEVELOPMENT**  
**70 WEST DEER PARK ROAD**

<b>NAME</b>	<b>ADDRESS (Please add Zip Code)</b>	<b>LOT PARCEL</b>	<b>BLOCK</b>	<b>ACCOUNT #</b>
Tomasz Gebala, Et Al	18019 Barley Corn Way Germantown, MD 20874	22	D	09-00840348
Herman Coleman, Jr.	4 Brighton Court Gaithersburg, MD 20877	21	D	09-00840337
Martha L. Hale	6 Brighton Court Gaithersburg, MD 20877	20	D	09-00840326
Maximo A. & Sofia Ramos	8 Brighton Court Gaithersburg, MD 20877	19	D	09-00840315
Matthew & C. Hudson	10 Brighton Court Gaithersburg, MD 20877	18	D	09-00840304
Susan E. Perper-Nicholson	12 Brighton Court Gaithersburg, MD 20877	17	D	09-00840292
Luciano & Carmen Vargas	14 Brighton Lane Gaithersburg, MD 20877	16	D	09-00840281
Moises Martinez Noemi Suero Melgar	30 Brighton Drive Gaithersburg, MD 20877	19	C	09-00840144
Andres A. Cruz, Et. Al	32 Brighton Drive Gaithersburg, MD 20877	20	C	09-00840155
Fernado & Vilma Mejia	34 Brighton Drive Gaithersburg, MD 20877	21	C	09-00840166
Robert C. Jee	35 Brighton Drive Gaithersburg, MD 20877	14	D	09-00840268
James D. & M. O'Connor	36 Brighton Drive Gaithersburg, MD 20877	22	C	09-00840177



<b>NAME</b>	<b>ADDRESS (Please add Zip Code)</b>	<b>LOT PARCEL</b>	<b>BLOCK</b>	<b>ACCOUNT #</b>
Mary M. & Cary A. Bloom	37 Brighton Drive Gaithersburg, MD 20877	15	D	09-00840270
Robert O. & Ou Rodriguez	38 Brighton Drive Gaithersburg, MD 20877	23	C	09-00840188
Kevin M. & Bernadette Ginley	40 Brighton Drive Gaithersburg, MD 20877	24	C	09-00840190
Jorge & M. C. Cabezas	42 Brighton Drive Gaithersburg, MD 20877	25	C	09-00840202
Jose R. & Marta A. Mancia	43 Brighton Drive Gaithersburg, MD 20877	23	D	09-00840350
Salvador & Dinora M. Rosales	44 Brighton Drive Gaithersburg, MD 20877	26	C	09-00840213
Robert S. & B.J. Conward	46 Brighton Drive Gaithersburg, MD 20877	27	C	09-00840224
Fairfield Broadstone LP	5510 Morehouse Drive Suite 200 San Diego, CA 92121	N939		09-00842770
Eugene B. Casey Found Trust	c/o Casey Mangt Inc. 800 S. Frederick Ave Suite 100 Gaithersburg, MD 20877	17		09-01470021
City of Gaithersburg	31 S. Summit Avenue Gaithersburg, MD 20877	P959		09-00777441
Steven R. Putnam	14 Virginia Drive Gaithersburg, MD 20877	5	B	09-00842633
John A. Arnold Dorothy Reitwiesner	16 Virginia Drive Gaithersburg, MD 209877	4	B	09-00842622
Francois D. & M.J. Martzloff	18 Virginia Drive Gaithersburg, MD 20877	3	B	09-00842848

<b>NAME</b>	<b>ADDRESS (Please add Zip Code)</b>	<b>LOT PARCEL</b>	<b>BLOCK</b>	<b>ACCOUNT #</b>
Board of Education	850 Hungerford Drive Rockville, MD 20850	P389		09-00817968
City of Gaithersburg	31 S. Summit Avenue Gaithersburg, MD 20877	P196		09-00818165
Engineering Tech Services Corporation	200 Manor Circle Takoma Park, MD 20912	P183		09-00819502
City of Gaithersburg	31 S. Summit Avenue Gaithersburg, MD 20877	P197		09-00821620
City of Gaithersburg	31 S. Summit Avenue Gaithersburg, MD 20877	P7	G	09-00842666
Francois D. & M.J. Martzloff	18 Virginia Drive Gaithersburg, MD 20877	2	B	09-00842837
City of Gaithersburg	31 S. Summit Avenue Gaithersburg, MD 20877	P130		09-01584765

# 4203495\_v1

Tomasz Gebala, Et Al  
18019 Barley Corn Way  
Germantown, MD 20874

Herman Coleman, Jr.  
4 Brighton Court  
Gaithersburg, MD 20877

Mr. Martha L. Hale\  
6 Brighton Court  
Gaithersburg, MD 20877

Maximo A. & Sofia Ramos  
8 Brighton Court  
Gaithersburg, MD 20877

Matthew & C. Hudson  
10 Brighton Court  
Gaithersburg, MD 20877

Susan Perper-Nicholson  
12 Brighton Court  
Gaithersburg, MD 20877

Luciano & Carmen Vargas  
14 Brighton Lane  
Gaithersburg, MD 20877

Moises Martinez  
Noemi Suero Melgar  
30 Brighton Drive  
Gaithersburg, MD 20877

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32 Brighton Drive  
Gaithersburg, MD 20877

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34 Brighton Drive  
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32 Brighton Drive  
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James D. & M. O'Connor  
36 Brighton Drive  
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Mary M. & Cary A. Bloom  
37 Brighton Drive  
Gaithersburg, MD 20877

Robert O. & Ou Rodriguez  
38 Brighton Drive  
Gaithersburg, MD 20877

Kevin M. & Bernadette Ginley  
40 Brighton Drive  
Gaithersburg, MD 20877

Jorge & M.C. Cabezas  
40 Brighton Drive  
Gaithersburg, MD 20877

Jose R. & Marta A. Mancia  
43 Brighton Drive  
Gaithersburg, MD 20877

Salvador & Dinora M. Rosales  
44 Brighton Drive  
Gaithersburg, MD 20877

Robert S. & B.J. Conward  
46 Brighton Drive  
Gaithersburg, MD 20877

Fairfield Broadstone LP  
5510 Morehouse Drive  
Suite 200  
San Diego, CA 92121

Eugene B. Casey Found Trust  
c/o Casey Mangt Inc.  
800 S. Frederick Ave  
Suite 100  
Gaithersburg, MD 20877

City of Gaithersburg  
31 S. Summit Ave  
Gaithersburg, MD 20877

Steven R. Putnam  
14 Virginia Drive  
Gaithersburg, MD 20877

John A. Arnold  
Dorothy Reitwiesner  
16 Virginia Drive  
Gaithersburg, MD 20877

Francois D. & M.J. Martzloff  
18 Virginia Drive  
Gaithersburg, MD 20877

Board of Education  
850 Hungerford Drive  
Rockville, MD 20850

Engineering Tech Services Corporation  
200 Manor Circle  
Takoma Park, MD 20912

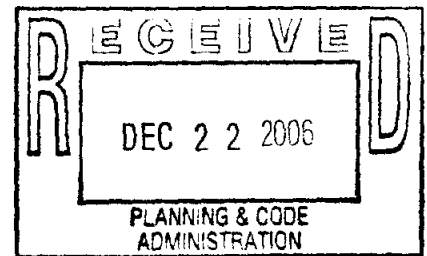


RST Development, LLC  
6001 Montrose Road  
Suite 710  
Rockville, MD 20852

Holland & Knight, LLP  
3 Bethesda Metro Center  
Suite 800  
Bethesda, MD 20814  
Attn: Robert R. Harris, Esq.



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ROCKVILLE, MARYLAND 20850  
TELEPHONE (301) 340-2020  
DIRECT (301) 838-3216  
FACSIMILE (301) 424-7125  
DIRECT FACSIMILE (301) 354-8116  
EMAIL: dpodolsky@steinsperling.com



December 21, 2006

Of Counsel to: Stein, Sperling, Bennett  
De Jong, Driscoll & Greenfeig, P.C.

City of Gaithersburg  
Board of Appeals  
c/o Caroline Seiden  
31 South Summit Avenue  
Gaithersburg, Maryland 20877

RE: Administrative Review Application A-526

Dear Ms. Seiden:

On behalf of the City of Gaithersburg, enclosed please find the following documents that we are filing in connection with the above-referenced matter:

1. Motion to Dismiss Appeal;
2. Memorandum in Support of Motion to Dismiss;
3. Proposed Order.

In the interests of administrative efficiency and convenience, we respectfully request that the Motion to Dismiss be heard at the Board's January 11, 2007 meeting and that the requirement that the parties file pre-hearing statements on the merits be suspended until the Board rules on the Motion to Dismiss, because if the Motion is granted, the need for the Applicant and for the City to address the merits of this case will be eliminated.

If you have any questions or anything further is required of us, please do not hesitate to call.

Very truly yours,

A handwritten signature in cursive script that reads "David R. Podolsky".

David R. Podolsky

DRP:ag  
Enclosures  
cc: Cathy Borten, Esquire  
Robert Harris, Esquire



BEFORE THE BOARD OF APPEALS FOR THE CITY OF GAITHERSBURG

IN THE MATTER OF  
RST DEVELOPMENT, LLC  
(WEST DEER PARK APARTMENTS)

Administrative Review  
Application Case A-526

MOTION TO DISMISS APPEAL

The City of Gaithersburg, by its undersigned counsel, respectfully moves the Board of Appeals to dismiss the Administrative Review Application (the "appeal") filed by RST Development, LLC in the above-captioned matter on or about November 22, 2006, and as grounds therefor states:

1. The appeal filed by RST Development, LLC was untimely.
2. The "Determination by City Attorney and Planning and Code Administration requiring approval of Site Plan Amendment. . ." (the "determination") referred to in the Administrative Review Application was made on October 23, 2006.
3. The "determination" was communicated to the applicant and the applicant's counsel at a meeting on October 23, 2006.
4. The Administrative Review Application in the above-captioned action was dated and filed November 22, 2006.
5. Section 24-188 of the Gaithersburg City Code provides, in relevant part:

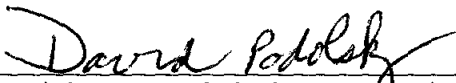


Petitions filed for administrative review may be initiated by any person aggrieved by a final order, requirements, decision or determination as set forth in subsection (a) of section 24-187 of this Code. Such petition shall be filed **within seventeen (17) days of the date of the action from which the appeal was filed, unless extended by law or by order of the board upon good cause shown not more than twenty-one (21) days after the date of the action appealed from.** (emphasis added)

6. November 22, 2006 is more than 17 days after October 23, 2006.

7. Accordingly, the Administrative Review Application in the above-captioned action was not timely filed and it must be dismissed.

WHEREFORE, the City of Gaithersburg respectfully requests that the Board of Appeals dismiss the above-captioned application, with prejudice.

  
David R. Podolsky, Esquire  
Stein, Sperling, Bennett,  
De Jong, Driscoll &  
Greenfeig, P.C.  
Counsel for the City of  
Gaithersburg  
25 West Middle Lane  
Rockville, Maryland 20850  
(301) 340-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that I mailed, U.S. postage prepaid, a copy of the foregoing this 21<sup>st</sup> day of December, 2006 to Robert R. Harris, Esquire, Holland & Knight, LLP, 3 Bethesda Metro Center, Suite 800, Bethesda, MD 20814.

  
\_\_\_\_\_  
David R. Podolsky

BEFORE THE BOARD OF APPEALS FOR THE CITY OF GAITHERSBURG

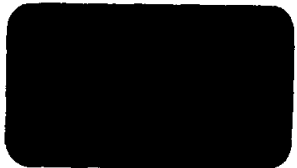
IN THE MATTER OF  
RST DEVELOPMENT, LLC  
(WEST DEER PARK APARTMENTS)

Administrative Review  
Application Case A-526

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

RST Development, LLC (the "Applicant") filed an Administrative Review Application in the above-captioned action on November 22, 2006. The Application purported to appeal a determination by the City Attorney and Planning Code Administration that was made on October 23, 2006. The Application included a memorandum in support of the appeal, a letter dated November 8, 2006 from Frederick J. Felton, Assistant City Manager, to Mr. Scott Copeland of RST Development, LLC, and a copy of an e-mail responding to a request for guidance regarding documents necessary to process a site plan amendment.

The letter from Mr. Felton, submitted by the Applicant, confirms a discussion that took place on October 23, 2006, and involved City staff and City attorneys along with representatives of the Applicant and the Applicant's attorney. As indicated in Mr. Felton's letter, on October 23, 2006, City staff through the City Attorney, communicated the City's determination that the Applicant must obtain approval for a site plan amendment from the Planning Commission prior to being



permitted to reoccupy the existing dwellings at the West Deer Park Apartments.

It is clear that Mr. Felton's letter merely referred to a determination that had been made and communicated directly to the Applicant and its counsel on October 23, 2006. Accordingly, the effective date of the "determination" that an approval of a site plan amendment was required was October 23, 2006. Mr. Felton's letter did no more than refer to the October 23, 2006 determination which, according to Mr. Felton's letter, had been reiterated on November 3, 2006. On its face, Mr. Felton's letter does not purport to render a new determination; it merely refers to the October 23, 2006 determination, and a subsequent determination (November 3, 2006) regarding documentation requirements.

The deadline for appealing the October 23, 2006 determination expired November 9, 2006, nearly 2 weeks before the Applicant filed the above-captioned Application. By November 22, 2006, the date when the Administrative Review Application was filed, the deadline for appealing the determination that approval of a site plan amendment would be necessary for reoccupation of the existing dwellings had expired.

It should be noted that, although Section 24-188 authorizes the Board of Appeals to extend the filing deadline from 17 days



after the date of the determination to not more than 21 days after the date of the decision appealed from, for good cause shown, even if the Applicant were able to show good cause, the Application was untimely because a 21-day appeal period would expire November 13, 2006 -- 9 days before the Application in this case was filed. Also, the Board should recognize that Mr. Felton's offer to consider objections regarding Mr. Ossont's position on submission requirements, did not purport to render, modify or otherwise make a decision regarding the necessity for approval of a site plan amendment.

The City's position is consistent with the law of Maryland as expressed by the Court of Appeals in *Badian v. Hickey*, 228 Md. 334, 179 A.2d 205 (1962), in which the Court of Appeals held that the period for appealing from an administrative decision ran from the date that the decision was announced at a public meeting and not from the date at which the determination was included in a written summary of the oral decision.

Also instructive is the Court of Appeals' decision in *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 650 A.2d 226 (1994). In that case, in 1985, the Baltimore County Zoning Commissioner advised UPS that a proposed distribution center would be a "warehouse" which is a permitted use. In 1987, after construction commenced, a local citizen wrote a letter to the Zoning Commissioner arguing that

the distribution center would be a "Trucking Terminal, Class I", which is allowed only by special exception. The Zoning Commissioner responded with a letter dated January 19, 1987 confirming his determination that the distribution center would be a warehouse. The citizen and some community associations attempted to appeal the January 19, 1987 "decision" to the Baltimore County Board of Appeals. The Court of Appeals held that the Baltimore County Board of Appeals did not have jurisdiction to hear the "appeal" because the "appeal" was untimely. The Court of Appeals stated:

In mandatory language, the Baltimore County statute states that a notice of appeal "shall" be filed within thirty days of the decision from which the appeal is taken. Under language like that set forth in BCC § 26-132, this Court has consistently held that, where the notice of appeal was not filed within the prescribed period after the final decision from which the appeal was taken, the appellate tribunal had no authority to decide the case on its merits. See, e.g. *Dabrowski v. Dondalski*, 320 Md. 392, 397-398, 578 A.2d 211, 214-215 (1990); *Walbert v. Walbert*, 310 Md. 657, 662, 531 A.2d 291, 293 (1987), and cases there cited. (336 Md. 569, 581)

The Court of Appeals found that the 1987 letter merely confirmed the earlier (1985) decision. The Court stated:

We agree with the Board of Appeals, and with Judge Cathell's dissenting opinion in the Court of Special Appeals, that the Zoning Commissioner's January 19, 1987, letter simply confirmed or reaffirmed his prior "approval" or "decision" that UPS's use was

a permitted one. See 93 Md.App. at 84, 611 A.2d at 1005 (Cathell, J., dissenting) ("It is absolutely clear to me that the Zoning Administrator merely reaffirmed his original decision") *Id.* at 583.

The logic behind the Court of Appeals' holding is indisputable. As the Court explained:

If Art. 25A, § 5(U), were construed to grant an appeal to a board of appeals from an administrative official's reaffirmation or statement that a license or permit had been properly issued or properly denied in the past, an applicant or a protestant could circumvent entirely the statutory time limits for taking appeals. In *Nat'l Inst. Health Fed. Cr. Un. v. Hawk*, 47 Md.App. 189, 195, 422 A.2d 55, 58-59 (1980), *cert. denied*, 289 Md. 738 (1981), the Court of Special Appeals, quoting the hearing examiner, explained:

" 'The "decision" which is the subject of [the] Appeals . . . is not a final administrative decision, order or determination. It is at most a reiteration or reaffirmation of the final administrative decision or order of the department granting the original Use and Occupancy Certificate . . . . If this were not the case an inequitable, if not chaotic condition would exist. All that an appellant would be required to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogue, and requests . . . with appropriate departmental authorities even on the most minute issues of contention with the ability to pursue a myriad of appeals ad infinitum.' "

The Zoning Commissioner, in responding to Mr. Hupfer on January 19, 1987, did not grant, deny, decide, or order anything. The Commissioner's letter simply explained and

defended the 1986 decision approving the application for a building permit. Consequently, the January 19, 1987, letter was not an "approval" or "decision" appealable to the Board of Appeals. *Id.* at 584.

Similarly, in *Meadows of Greenspring Homeowners Association, Inc. v. Foxleigh Enterprises, Inc.*, 133 Md.App. 510, 518, 758 A.2d 611, 615 (2000) the Court of Special Appeals, found:

Appellants' argument fails to recognize that Jablon's [the Director of the Baltimore County Department of Permits and Development Management] letter does not make any decision and is not an order. It does not issue or modify any license, permit or approval.

In the present case, the determination, on October 23, 2006, that a site plan amendment is required was not subject to any further consideration by the City. The Applicant cannot grant itself an extension of the appeal period by calling or writing to the Assistant City Manager, requesting that the City Manager reiterate a determination previously finalized.

Finally, the Applicant has acknowledged that the City staff's determination was made prior to Mr. Felton's November 8, 2006 letter. In a letter to Mr. Felton dated December 6, 2006, the Applicant's counsel stated:

. . .The purpose of this letter is to respond to your November 8 letter to Mr. Scott Copeland in which you repeated the City's determination that the apartment

units at this project could not be reoccupied without approval of a Site Plan Amendment. As indicated below, we disagree with that determination and have filed an Application for Administrative Review with the Gaithersburg Board of Appeals . . .

(A copy of the full letter is attached hereto for the Board's convenience and to show that the Applicant's counsel's statement is not being taken out of context).

Thus, it is uncontested that Mr. Felton's letter of November 8, 2006 merely reiterated the October 23, 2006 determination that the Applicant is attempting to appeal.

In view of the foregoing, based upon the materials submitted by the Applicant, it is clear that the Application was not timely filed and must be dismissed.

Respectfully submitted,



David R. Podolsky, Esquire  
Stein, Sperling, Bennett,  
De Jong, Driscoll &  
Greenfeig, P.C.  
Counsel for the City of  
Gaithersburg  
25 West Middle Lane  
Rockville, Maryland 20850  
(301)340-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that I mailed, U.S. postage prepaid, a copy of the foregoing this 21<sup>st</sup> day of December, 2006 to Robert R. Harris, Esquire, Holland & Knight, LLP, 3 Bethesda Metro Center, Suite 800, Bethesda, MD 20814.

  
David R. Podolsky

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# Holland+Knight

Tel 301 654 7800  
Fax 301 656 3978

Holland & Knight LLP  
3 Bethesda Metro Center, Suite 800  
Bethesda, MD 20814-6337  
www.hklaw.com

Robert R. Harris  
301 215 6607  
robert.harris@hklaw.com

December 6, 2006

Via E-Mail & First Class Mail

Mr. Frederick J. Felton  
Assistant City Manager  
City of Gaithersburg  
31 South Summit Ave  
Gaithersburg, MD 20877

Re: West Deer Park Apartments

Dear Mr. Felton:

As you are aware, we represent RST Development, LLC, the owner of the West Deer Park Apartments at 70 West Deer Park Road. The purpose of this letter is to respond to your November 8 letter to Mr. Scott Copeland in which you repeated the City's determination that the apartment units at this project could not be reoccupied without approval of a Site Plan Amendment. As indicated below, we disagree with that determination and have filed an Application for Administrative Review with the Gaithersburg Board of Appeals. We will be asserting to the Board of Appeals the arguments that are outlined below.

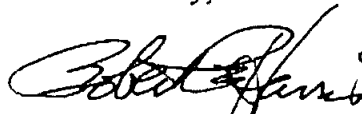
Through you and the City Attorney, we have been informed the City will not allow this property to be reoccupied for its multi-family residential purpose because the City believes it constitutes a non-conforming use. More specifically, the City Attorney has indicated that the non-conforming use would exist because the number of parking spaces does not conform with the City's current standards. As you are aware, the Gaithersburg Zoning Ordinance defines a non-conforming use in Section 24-1 as follows: a use of a building or of land lawfully existing at the time this chapter or the previous Zoning Ordinance became effective and which does not conform with the use regulations of the zone in which it is located. The subject property is zoned R-20 and the use regulations for that zone are contained in Section 24-56 of the Zoning Ordinance. Those use regulations allow multiple family dwellings and any use on the property which is customarily incidental and subordinate to the principal use. In this regard, off-street parking and the swimming pool also are allowed. Both the previous and intended future use of this property is for multiple family dwellings, with a swimming pool and off-street parking. These uses conform with the use standards of Section 24-56 such that they cannot be considered "non-conforming uses." Additionally, any revision to the standards for parking, subsequent to the construction of the project, does not make such parking a non-conforming use. Moreover,

Mr. Frederick J. Felton  
December 6, 2006  
Page 2

even if the use were somehow redefined now to become a non-conforming use in some respect, the proposal does not involve any enlargement, increase, movement or structural alteration of the existing buildings or parking. Therefore, pursuant to Sections 24-17, 24-18, and 24-19, the provisions applicable to non-conforming uses still would not apply. Also, Section 24-20 allows renovation and repair work to occur even on non-conforming uses where such work does not exceed 10% of the current replacement value of the structure. The proposed work does not exceed that amount. Moreover, pursuant to Section 24-168, there is no contemplated erection, movement, addition or structural alteration to the buildings or parking that would require a Site Development Plan Amendment. Finally, but for the fact that the City continues to disallow reoccupation of the dwelling units at this property, there would not be any discontinuation of use within the statutory time period. Our client has been ready, willing and able to proceed with the intended renovation work since September but the City has not allowed that to proceed.

We understand the matter is scheduled for a hearing at the Board of Appeals on January 11, 2007. Please let me know as early as possible if the City decides to change its ruling in the November 8, 2006 letter and to allow this renovation work to proceed so that we can withdraw that appeal if appropriate.

Sincerely,



Robert R. Harris

cc: Dave Humpton, City Manager  
Cathy Borden, City Attorney  
Greg Ossant, Director of Planning and Code Administration  
David Podolsky, Esq.  
Scott Copeland

#4232425\_v1



BEFORE THE BOARD OF APPEALS FOR THE CITY OF GAITHERSBURG

IN THE MATTER OF  
RST DEVELOPMENT, LLC  
(WEST DEER PARK APARTMENTS)

Administrative Review  
Application Case A-526

O R D E R

On consideration of the Administrative Review Application filed by RST Development, LLC in the above-captioned matter and the Motion to Dismiss filed by the City of Gaithersburg, it is this \_\_\_\_ day of \_\_\_\_\_, 2007, by the Gaithersburg City Board of Appeals,

ORDERED, that the Motion to Dismiss be and the same is hereby GRANTED; and it is further

ORDERED, that the Administrative Review Application in the above-captioned action be and the same is hereby DISMISSED.

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City of Gaithersburg  
Board of Appeals

BEFORE THE BOARD OF APPEALS FOR THE CITY OF GAITHERSBURG

IN THE MATTER OF  
RST DEVELOPMENT, LLC  
(WEST DEER PARK APARTMENTS)

Administrative Review  
Application Case A-526

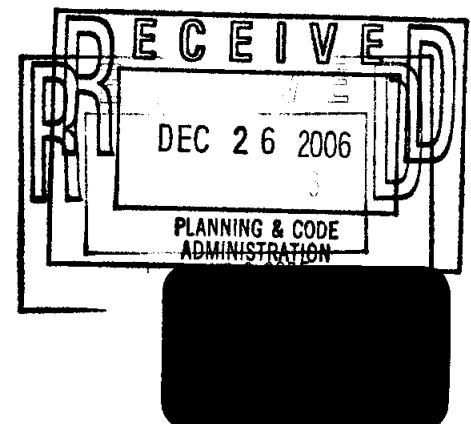
PRE-HEARING SUBMISSION

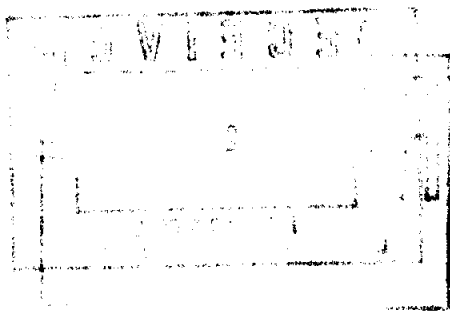
Pursuant to the City of Gaithersburg Board of Appeals Rules of Procedure (November 2001), Section 2.4, the Petitioner, by its undersigned counsel hereby submits the following pre-hearing statement:

(1) Statement of the grounds upon which Petition is based

The Petitioner, RST III, LLC (the "Petitioner") seeks reversal of the decision rendered by the City Attorney and the Planning and Code Administration (the "City") set forth in their letter of November 8, 2006. In this letter the City informed the Petitioner that approval of a site plan amendment from the Planning Commission would be required prior to being permitted to reoccupy the existing dwellings located at 70 West Deer Park Road, Gaithersburg, Maryland (the "Property"). The Petitioner submits that this requirement is contrary to the laws and regulations of the City, and unsupported by Maryland case law. Petitioner requests that the Board of Appeals reverse this decision by the City.

The Property is classified in the R-20 zone (medium density residential) and is improved with multi-family residential buildings, which are a permitted use in the zone. The existing improvements were approved by the Planning Commission on July 19, 1970 (Site Plan No. S-236), and were constructed in 1973. The apartments on the Property have been in operation for many years.





The existing apartments on the Property are now vacant. The Petitioner desires to make relatively minor interior renovations to the existing structures and re-lease the apartments. There will be no enlargement of the building, and no structural alterations or additions. The Petitioner has been advised by the City in the referenced letter that "[Petitioner] must obtain approval for a site plan amendment from the Planning Commission prior to being permitted to reoccupy the existing dwellings at West Deer Park Apartments." The letter contains no rationale for the City's position.

On behalf of Petitioner, we submit that the City's position is in clear opposition to the provisions of the City of Gaithersburg Code (the "Code"). Article V., Sec. 24-168 of the Code enumerates when approval of a site development plan is required for a property in the City. It states in paragraph one:

No building or structure shall be hereafter erected, moved, added to or structurally altered under circumstances which require the issuance of a building permit under this chapter, nor shall any use be established, altered or enlarged under circumstances which require the issuance of a use and occupancy permit under this chapter, upon any land, until a site development plan for the land upon which such building, structure or use is to be erected, moved, added to, altered, established or enlarged has been approved by the city planning commission. This requirement shall not apply to the use of any single-family dwelling for residential purposes.

A review of this section of the Code makes clear that approval of a site plan amendment should not be required prior to allowing the apartments to be reoccupied. A site plan was approved for the existing Deer Park Apartment complex in 1970. The referenced site plan provisions would

require a new site plan approval only if: 1) Petitioner was seeking approval of a building permit to "erect, move, add to or structurally alter a building on land in the City" or 2) Petitioner was seeking a use and occupancy permit in order to "establish, alter or enlarge a use on land in the City." Neither provision is applicable to Petitioner's request to continue to utilize the existing improvements on the Property as apartments. This use has already been approved by the City and no building permit to "erect, move, add to or structurally alter" the improvements is sought by the Petitioner.

Further, even if the above provisions applied, the Petitioner's request falls squarely into the exceptions contained in the second paragraph of Sec. 24-168. This paragraph states that notwithstanding the above language "no site development plan shall be required to be submitted or approved" prior to permit issuance if the "proposed use is a permitted use in the zone and is substantially similar to the use to which the premises were put by the last prior occupant thereof, and the property on which the use is proposed to be located has been the subject of a site development plan approved by the planning commission." A site plan was approved by the Planning Commission for the Property on July 19, 1970. Apartments are a permitted use in the zone, and the proposed use for the Property is exactly the same as the prior approved use. This language would clearly exempt Petitioner from a requirement for a new site plan approval.

This section goes on to state that no site development plan is required in cases where the requested permit proposes changes to an existing building that "will not increase the exterior dimensions of the building or substantially increase the useable space within the building." Again, the Petitioner's request falls squarely into this language, which also expressly abrogates the requirement for a site plan amendment. The Petitioner plans only interior renovations which

will not increase the exterior dimensions of the building, nor increase the useable space in the buildings on the Property.

In summary, the language of the Code contained in Section 24-168 regarding site plan approvals for property in the City mandates a finding by the Board of Appeals that the Petitioner is expressly exempt from such a requirement, given the facts and circumstances of this case. As such, the decision of the City should be reversed.

While not stated in the November letter, Planning Commission Staff indicated in discussions with the Petitioner that the City's basis for the requirement for site plan approval is that the proposed use of the Property as apartments is a "non-conforming use." Again, we respectfully submit that this is an incorrect interpretation of the Code as well as contrary to established case-law on non-conforming uses.

Section 24-1 of the Code defines non-conforming use as:

A use of a building or of land lawfully existing at the time this chapter or the previous zoning ordinance became effective and which does not conform with the use regulations of the zone in which it is located.

As stated previously, the Property is zoned R-20. The proposed use for the Property is as apartments. Section 24-56 of the Code identifies the uses permitted as of right in the R-20 zone. Sub-section (2) includes "Two family dwellings, multiple-family and multi-family condominium dwellings." Apartments are considered "multiple-family dwellings."

Pursuant to Section 24-1 of the Code, in order to be a non-conforming use, the proposed use would have to be a use "which does not conform with the use regulations of the zone in which it is located." Since multi-family dwellings are a permitted use in the R-20 zone, the use of the Property for apartments is not a non-conforming use. Sections 24-17 and 24-19 of the

Code, which govern continuation of non-conforming uses, do not apply since the proposed use is not non-conforming.

Section 24-18 of the Code addresses non-conforming structures. While the Petitioner has not been advised that the structures on the Property are non-conforming, even if this were the case this section of the Code would not prohibit the Petitioner's proposed use, nor trigger a requirement for approval of a site plan. Section 24-18 allows a structure which could not be built under the current Code provisions to be continued subject to three provisions. These are: 1) the structure cannot be enlarged or altered to increase its non-conformity; 2) if the structure is destroyed or damaged to the extent of more than 50% of its replacement cost it must be reconstructed in conformity with the Code requirements; and 3) if the structure is moved it must conform to the regulations of the zone to which it is moved. The existing structures on the Property are not being enlarged or altered to increase a non-conformity, they have not been destroyed and they are not being moved. Therefore, these provisions are inapplicable.

In summary, the Petitioner's request to utilize the existing improvements on the Property as apartments is specifically permitted by Section 24-168 of the Code, does not constitute a non-conforming use and should not require a new site plan approval. We respectfully request that the Board of Appeals reverse the determination of the City that a site plan amendment is required prior to re-occupancy of the apartments located on the Property.

(2) Copies of reports, studies, documents and plans to be introduced at the hearing:

- i) Zoning and Vicinity map for the Property
- ii) Site plan approval letter
- iii) Approved Site Plan
- iv) Copy of November 8, 2006 letter from the City

- v) Selected provisions of the Code and City procedures
- vi) Other documents as appropriate to address testimony and arguments offered in opposition to the Petition

(3) Summary of Expert Testimony

No expert witness is expected to be called at this time.

(4) Identity of witnesses who will testify

- i) Steven Siegel
- ii) Scott Copeland

(5) Estimated time for presentation- One (1) hour for direct presentation

Respectfully submitted,


A handwritten signature in black ink, appearing to read "Robert R. Harris", written over a horizontal line.

Robert R. Harris  
Holland & Knight LLP  
3 Bethesda Metro Center  
Bethesda, Maryland 20814  
(301) 215-6607  
Attorneys for Petition



CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that I mailed, U.S. postage prepaid, a copy of the foregoing this 22<sup>nd</sup> day of December, 2006, to David R. Podolsky, Esquire, 25 West Middle Lane, Rockville, Maryland, 20850.



Robert R. Harris

# 4257155\_v1

CITY OF GAITHERSBURG PLANNING DEPARTMENT

Stearman - Kaplan  
5300 Westbard Avenue  
Bethesda, Maryland 20014

S-236 -- KRA-BARR APARTMENTS  
Deer Park Road West

Dear Applicant:

The Planning Commission of the City of Gaithersburg at their last regular scheduled meeting has granted your application for the final site development approval.

All permits which are required by the Ordinance of the City of Gaithersburg may now be applied for at the Department of Licenses and Regulations at the Civic Center, 31 South Summit Avenue.

This approval is issued subject to all contingencies enumerated on the reverse side of this form. Items not shown on the application that the Commission requires to be included in the project are as follows:

None.

cc: Department of Licenses and Inspections

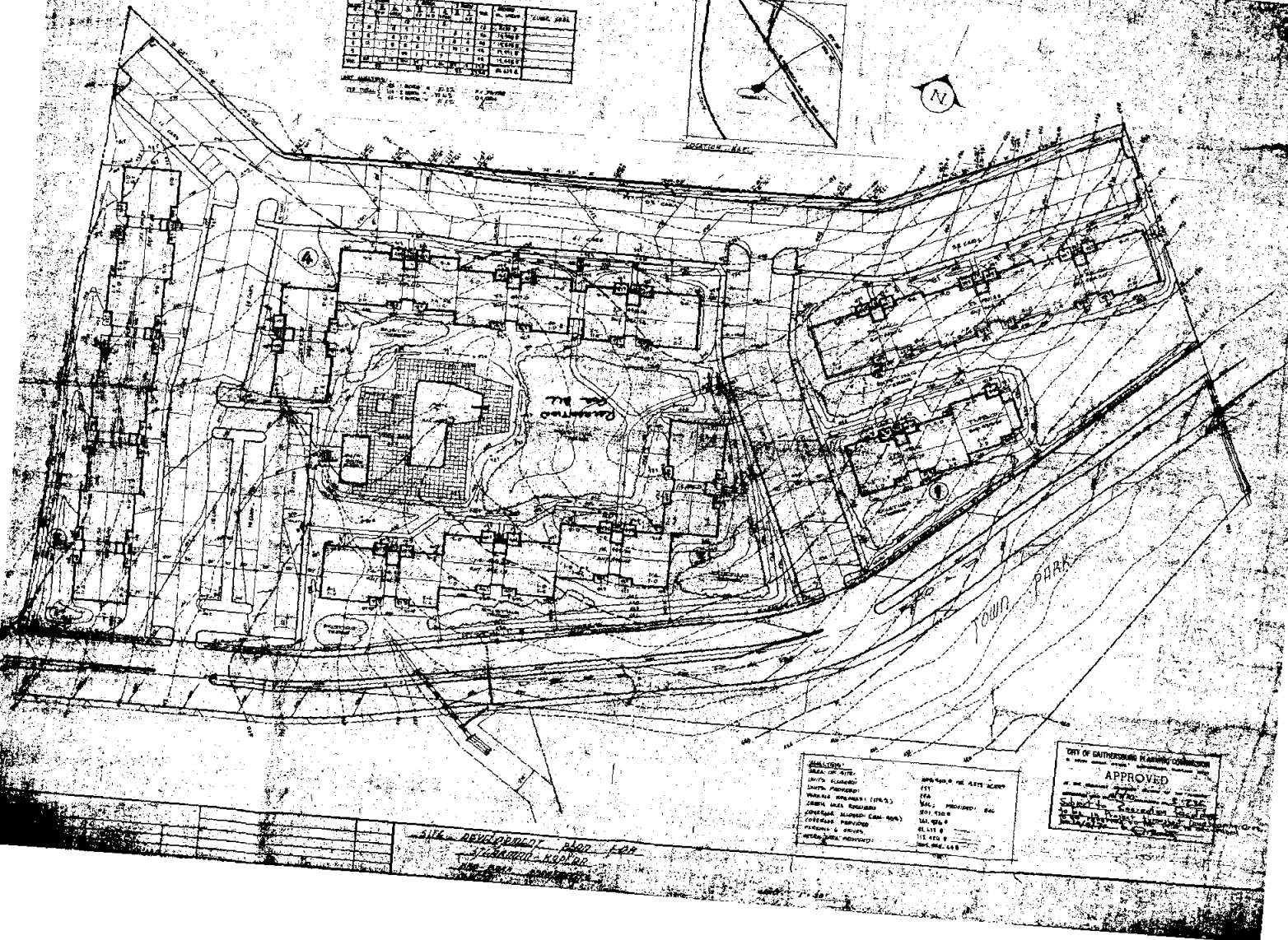
Date: October 12, 1970

Planning Director: \_\_\_\_\_

Carl A. Zellner

NO.	AREA	ACRES	PERCENT	TOTAL PERCENT
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2	2	1.00	100.00	100.00
3	3	1.00	100.00	100.00
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100	100	1.00	100.00	100.00

DATE: 10/1/50  
 BY: [illegible]  
 FOR: [illegible]



DESCRIPTION	AMOUNT
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CITY OF DALLAS PLANNING COMMISSION  
 APPROVED  
 [Signature]  
 [Date]

ALL DEVELOPMENT SHALL BE  
 IN ACCORDANCE WITH THE  
 CITY OF DALLAS ZONING ORDINANCE

GAITHERSBURG

CITY

CODE

B—*Interior lot*, defined as a lot other than a corner lot with only one frontage on a street other than an alley.

C—*Through lot*, defined as a lot other than a corner lot with frontage on more than one street other than an alley. Through lots with frontage on two (2) streets may be referred to as double frontage lots.

D—*Reversed frontage lot*, defined as a lot in which the frontage is at right angles or approximately right angles to the general pattern in the area involved. A reversed frontage lot may also be a corner lot or an interior lot (see A-I and B-D in the diagram).

*Medical care building*. An establishment where patients are accepted for special study and treatment by a group of physicians practicing medicine together.

*Medical practitioner*. A licensed physician, surgeon, dentist, osteopath, chiropractor or similar practitioner.

*Mining, quarrying or earth removing*. The excavation of any natural mineral deposit or soil for commercial sale.

*Mobile home*. A movable or portable dwelling built on a chassis connected to utilities and designed without a permanent foundation for year-round living.

*Mobile home park*. Any plot of ground of at least eight (8) acres upon which a minimum of ten (10) mobile home spaces are located.

*Monopole*. A single, freestanding pole-type structure, tapering from base to top and supporting one or more antenna. For purposes of this chapter, a monopole is not a tower.

*Motel*. Any group of guest rooms, combined or separated, used for the purpose of housing short-term transient guests, each unit of which is provided with its own toilet and washroom facilities, but do not include kitchen or kitchenette facilities or equipment in the guest units.

*Nonconforming use*. A use of a building or of land lawfully existing at the time this chapter or the previous zoning ordinance became effective and which does not conform with the use regulations of the zone in which it is located.

*Opiate addiction treatment facility*. A facility operated privately and not by a governmental unit that is registered with the Drug Enforcement Administration, which administers methadone or levo-alpha-acetyl-methado (LAAM) as part of a maintenance or treatment program for opiate dependent persons. An opiate addiction treatment facility is not a clinic or medical or professional office as those uses are applied in this zoning ordinance.

*Outdoor advertising business*. Provision of outdoor displays or display space on a lease or rental basis only.

*Outlot*. A parcel of land shown on a record plat but inadequate as a buildable lot due to insufficient size or frontage. Adjoining outlots in adjacent subdivisions may be used as a lot if combined they meet the minimum requirements for area and frontage imposed by this chapter in the zone in which they are situated.

If two (2) or more lots or combinations of lots and portions of lots with continuous frontage in single ownership are not of record on March 22, 1965, or at the time of passage of an amendment of this chapter, and if all or part of the lot do not meet the requirements for lot width and area as established by this chapter, the land involved shall be considered to be an undivided parcel for the purpose of this chapter, and no portion of such parcel shall be used or sold which does not meet lot width and area requirements established by this chapter, nor shall any division of the parcel be made which leaves remaining any lot with width or area below the requirements stated in this chapter.

(Ord. No. O-2-65, art. 1, § 4)

**Sec. 24-16. Exceptions for certain dimensional nonconformities.**

Notwithstanding any other provision of this chapter, where land within the city is occupied by one or more structures in compliance in all respects with this chapter, and part of such land is acquired by any governmental agency, and such acquisition causes the property in question to be in violation of one or more provisions of this chapter including, but not limited to, insufficient net lot area, insufficient off-street parking, excess percentage of coverage of the lot by the structure, insufficient minimum yards, insufficient green space or excessive height of the structure or structures shall not be treated as in violation of this chapter and may be used, structurally altered, reconstructed, repaired or enlarged to the same extent that such use, structural alteration, reconstruction, repair or enlargement would have been permissible under the provisions of this chapter had the acquisition by such public agency not taken place.

(Ord. No. O-3-71)

**Sec. 24-17. Nonconforming uses of land.**

Where, on March 22, 1965, or on the date of adoption of an amendment of this chapter, lawful use of land exists that is made no longer permissible under the terms of this chapter as enacted or amended, such use may be continued, so long as it remains otherwise lawful, subject to the following provisions:

- (a) No such nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied on March 22, 1965, or on the effective date of an amendment of this chapter.
- (b) No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use on March 22, 1965, or on the effective date of an amendment of this chapter.
- (c) If any such nonconforming use of land ceases for any reason for a period of more than ninety days, any subsequent use of such land shall conform to the regulations specified by this chapter for the zone in which such land is located.

(Ord. No. O-2-65, art. 1, § 4)

**Sec. 24-18. Nonconforming structures.**

Where a lawful structure exists on March 22, 1965, or on the effective date of an amendment of this chapter that could not be built under the terms of this chapter by reason of restrictions

on area, lot coverage, height, yards or other characteristics of the structure or its location on the lot, such structure may be continued so long as it remains otherwise lawful, subject to the following provisions:

- (a) No such structure may be enlarged or altered in a way which increases its nonconformity.
- (b) Should such structure be destroyed by any means to an extent of more than fifty (50) percent of its replacement cost at time of destruction as determined by the building inspector, it shall not be reconstructed except in conformity with the provisions of this chapter.
- (c) Should such structure be moved for any reason for any distance whatever, it shall thereafter conform to the regulations for the zone in which it is located after it is moved.

(Ord. No. O-2-65, art. 1, § 4)

**Sec. 24-19. Nonconforming use of structures.**

If a lawful use of a structure or of a structure and premises in combination, exists on March 22, 1965, or on the effective date of an amendment of this chapter, that would not be allowed in the zone under the terms of this chapter, the lawful use may be continued so long as it remains otherwise lawful, subject to the following provisions:

- (a) No existing structure devoted to a use not permitted by this chapter in the zone in which it is located shall be enlarged, extended, constructed, reconstructed, moved or structurally altered except in changing the use of the structure to a use permitted in the zone in which it is located.
- (b) Any nonconforming use may be extended throughout any parts of a building which were manifestly arranged or designed for use on March 22, 1965, or at the time of an amendment of this chapter, but no such use shall be extended to occupy any land outside such building.
- (c) If no structural alterations are made, any nonconforming use of a structure or structure and premises may be changed to another nonconforming use only upon a finding by the city council, after public hearing, that the change is required (i) to preserve a historic structure, or (ii) as part of the renewal, revitalization or restoration of a specific geographic area designated by the city council, or (iii) to prevent a confiscatory taking of the property. In permitting such change, the city council may require appropriate conditions and safeguards to protect and enhance the public welfare.
- (d) Any structure or structure and land in combination, in or on which a nonconforming use is superseded by a permitted use, shall thereafter conform to the regulations for the zone in which such structure is located, and the nonconforming use may not thereafter be resumed.

- (e) When a nonconforming use of a structure, or structure and premises in combination, is discontinued or abandoned for six consecutive months or for eighteen months during any three-year period, the structure, or structure and premises in combination, shall not thereafter be used except in conformance with the regulations of the zone in which it is located.
- (f) Where nonconforming use status applies to a structure and premises in combination, removal or destruction of the structure shall eliminate the nonconforming status of the land.

(Ord. No. O-2-65, art. 1, § 4; Ord. No. O-18-82, § 1)

#### **Sec. 24-20. Repairs and maintenance.**

On any structure devoted in whole or in part to any nonconforming use, work may be done in any period of twelve consecutive months on ordinary repairs or on repair or replacement of nonbearing walls, fixtures, wiring or plumbing, to an extent not exceeding ten percent of the current replacement value of the structure; provided, that the cubic content of the structure shall not be increased.

Nothing in this chapter shall be deemed to prevent the strengthening or restoring to a safe condition of any building or part thereof declared to be unsafe by any official charged with protecting the public safety, upon order of such official.

(Ord. No. O-2-65, art. 1, § 4)

#### **Sec. 24-21. Uses under exception provisions not nonconforming uses.**

Any use for which a special exception is permitted as provided in this chapter shall not be deemed a nonconforming use, but shall, without further action, be deemed a conforming use in such zone.

(Ord. No. O-2-65, art. 1, §4)

#### **Sec. 24-21.1. Enlargement, relocation, replacement, repair or alteration of nonconforming structures.**

Anything to the contrary in this chapter notwithstanding, the planning commission shall be authorized to permit any nonconforming structure, or any structure occupied by a nonconforming use, to be enlarged, relocated, replaced, repaired or structurally altered in any zone upon a finding by the commission that such work will not adversely affect the use or development of any other property, upon such conditions as the commission shall find necessary to avoid such adverse effect.

(Ord. No. O-07-78)



## DIVISION 5. R-20 ZONE, MEDIUM DENSITY RESIDENTIAL

**Sec. 24-55. Purpose of zone.**

The R-20 Zone is intended to stabilize and protect medium density areas by reducing hazards to the living environment and to provide for a varied, denser urban residential pattern suitable to the needs of the population by encouraging a range of dwelling types.

(Ord. No. O-2-65, Art. 3, § 1)

**Sec. 24-56. Uses permitted by right.**

The following uses are permitted by right in the R-20 Zone:

- (1) All uses permitted in the R-T Zone.
  - (2) Two family dwellings, multiple-family and multiple family condominium dwellings.
  - (3) Boardinghouses and rooming houses.
  - (4) Fraternity and sorority houses.
  - (5) Accessory uses and structures, including but not limited to:
    - (a) Accessory uses and structures permitted in the R-90 Zone.
    - (b) Business office for the administration of multiple-family dwellings containing more than twenty-four (24) dwelling units.
    - (c) Swimming pools for the exclusive use of the residents of the dwelling or dwellings located on the same parcel or lot.
    - (d) Home based businesses authorized pursuant to Article X, Chapter 24 of this Code.
  - (6) Child or elderly day care facilities in single-family detached dwelling units or duplexes accommodating not more than eight (8) individuals.
  - (7) Towers, poles, antennas or other structures intended for use in connection with transmission or receipt of radio or television signals, or both, subject to the provisions of section 24-167A of this Code.
  - (8) Bed and breakfast subject to the requirements contained in section 24-167B.
  - (9) Public buildings and uses.
- (Ord. No. O-2-65, Art. 3, § 1; Ord. No. O-1-73, § 2; Ord. No. O-1-76, § 1; Ord. No. O-1-79; Ord. No. O-5-80, § 2; Ord. No. O-20-87, 9-8-87; Ord. No. O-3-88, 3-24-88; Ord. No. O-5-93, 4-12-93; Ord. No. O-17-93, 11-15-93; Ord. No. O-1-96, 2-5-96; Ord. No. O-8-98, § 2, 8-3-98; Ord. No. O-13-02, 11-4-02)

(2) *Existing pawnshops regulation thereof.* Any pawnshops lawfully operating within the city as of the effective date of this section shall be subject to the following additional requirements and restrictions:

- (a) All existing pawnshops located within the city shall, by not later than September 1, 2001, be located only on property zoned I-3 and shall conform to the requirements of section 24-144 of this Code.
  - (b) Any pawnshop not conforming to the requirements of section 24-167C(2)(a) above shall cease operations and shall not be a lawful nonconforming use.
  - (c) Pawnshops in existence on land zoned other than in the I-3 Zone after the expiration of the period provided in section 24-167C(2)(a) above shall be subject to the enforcement procedures and penalties provided in section 24-184 of this Code.
- (Ord. No. O-4-98, 4-6-98)

## ARTICLE V. SITE DEVELOPMENT PLANS

### Sec. 24-168. When required.

No building or structure shall be hereafter erected, moved, added to or structurally altered under circumstances which require the issuance of a building permit under this chapter, nor shall any use be established, altered or enlarged under circumstances which require the issuance of a use and occupancy permit under this chapter, upon any land, until a site development plan for the land upon which such building, structure or use is to be erected, moved, added to, altered, established or enlarged has been approved by the city planning commission. This requirement shall not apply to the use of any single-family dwelling for residential purposes.

Notwithstanding the foregoing, no site development plan shall be required to be submitted or approved where the city manager or his designee, upon reviewing an application for use and occupancy permit, is satisfied that the proposed use is a permitted use in the zone and is substantially similar to the use to which the premises were put by the last prior occupant thereof, and the property on which the use is proposed to be located has been the subject of a site development plan approved by the planning commission. A proposed use shall not be deemed substantially similar to a prior use where this chapter imposes more stringent requirements for the proposed new use as to off-street parking, yards, height limits or minimum lot size. Notwithstanding the foregoing, no site development plan shall be required to be submitted or approved where the city manager or his designee, upon reviewing an application for a building permit for changes in an existing building, is satisfied that the proposed changes in the building will not increase the exterior dimensions of the building or substantially increase the usable space within the building.

(Res. No. R-19-66; Ord. No. O-3-73; Ord. No. O-6-79, § 2; Ord. No. O-1-88, 1-4-88)

CITY OF GAITHERSBURG  
31 South Summit Avenue  
Gaithersburg, Maryland 20877  
Telephone:301-258-6330

**BOARD OF APPEALS  
NOTICE OF ADMINISTRATIVE REVIEW**

In accordance with Section 24-187 through 190 of the City of Gaithersburg Zoning Ordinance, the City of Gaithersburg Board of Appeals will conduct an Administrative Review as noted below.

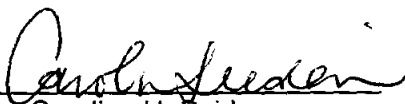
*Application Type:*     **ADMINISTRATIVE REVIEW**  
*File Number:*        **A-526**  
*Location:*           **70 WEST DEER PARK ROAD**  
*Petitioner:*          **RST DEVELOPMENT, LLC**  
*Day/ Date/Time:*     **THURSDAY, JANUARY 11, 2007, 7:30 P.M.**  
*Place:*               **COUNCIL CHAMBERS**  
                             **31 SOUTH SUMMIT AVENUE**

The application requests an Administrative Review of a of a determination by City staff requiring a site plan amendment approval from the Planning Commission prior to reoccupation of existing dwellings at West Deer Park Apartments, 70 West Deer Park Road, Parcel A, Gaithersburg, Maryland.

As per Section 2.4(b) of the Board of Appeals Rules of Procedure, persons or associations intending to appear in opposition to a petition whether or not represented by counsel, must file a prehearing statement no later than seven (7) days prior to the date of the hearing. Nothing in this section should be construed to limit the rights of individual members of the public to submit testimony during the hearing or to submit pertinent written materials at any time while the record remains open. However, please note Section 2.4(d) relating to the Board's authority to prohibit the testimony of a party's witness not identified due to the failure to comply with Section 2.4(a) and/or (b).

Further information may be obtained from the Department of Planning and Code Administration at City Hall, 31 South Summit Avenue, between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday.

CITY OF GAITHERSBURG

By:   
Caroline H. Seiden  
Planner

(over)



NOTICES SENT THIS 27TH DAY OF DECEMBER, 2006 TO:

PETITIONER :

RST Development, LLC, 6001 Montrose Road, Suite 710, Rockville, MD 20852

INTERESTED PARTIES AND PROPERTY OWNERS WITHIN 200 FEET OF SUBJECT PROPERTY:  
(A complete list of property owners notified is available in the Planning and Code Administration.)

CITY STAFF:

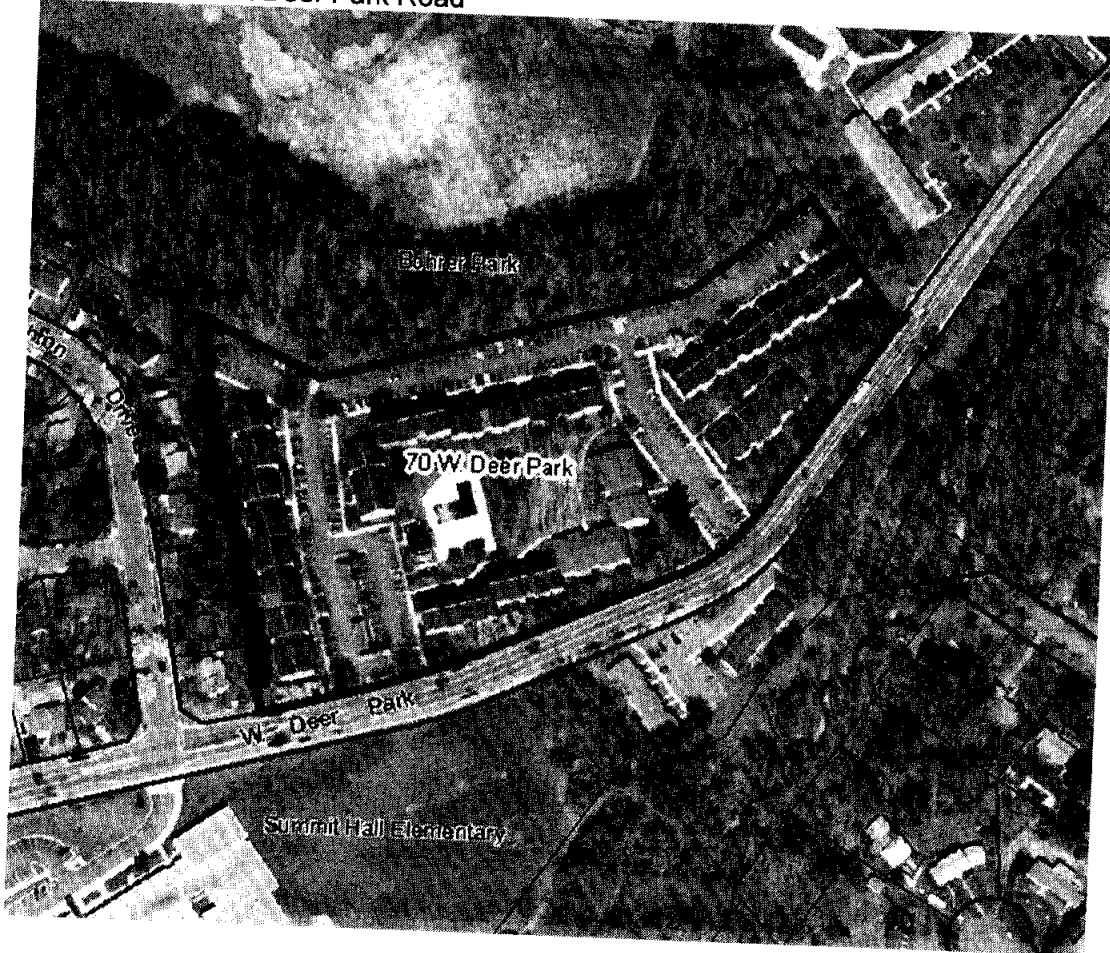
Dave Humpton, City Manager  
Cathy Borten, City Attorney  
Britta Monaco, Public Information Office  
Doris Stokes, City Manager's Office  
Greg Ossont, Director of Planning &  
Code Administration  
Trudy Schwarz, Community Planning Dir.  
Jeff Baldwin, City Web Administrator (via email)

BOARD OF APPEALS MEMBERS:

Harvey Kaye, Chairperson  
Richard Knoebel, Vice Chairperson  
Gary Trojak  
Victor Macdonald  
Carol Rieg  
David Friend, Alternate  
William Chen, Attorney for the Board of Appeals

PLANNING COMMISSION

A-526 – 70 West Deer Park Road



BOARD OF EDUCATION  
850 HUNGERFORD DR  
ROCKVILLE MD 20850

DAVID PODOLSKY  
ATTORNEY AT LAW  
25 W. MIDDLE LANE  
ROCKVILLE MD 20850

ENGINEERING TECH SERVICES CORP  
200 MANOR CIR  
TAKOMA PARK MD 20912

EUGENE B FOUNDTRUSTUST CASEY  
C/O CASEY MANGT INC  
800 S FREDERICK AVE STE 100  
GAITHERSBURG MD 20877

FAIRFIELD BROADSTONE LP  
5510 MOREHOUSE DR STE 200  
SAN DIEGO CA 92121

FERNADO & VILMA MEJIA  
34 BRIGHTON DR  
GAITHERSBURG MD 20877

FRANCOIS D & M J MARTZLOFF  
18 VIRGINIA DRIVE  
GAITHERSBURG MD 20877

JAMES D & M O'CONNOR  
36 BRIGHTON DR  
GAITHERSBURG MD 20877

JOHN A ARNOLD  
DOROTHY REITWIESNER  
16 VIRGINIA DR  
GAITHERSBURG MD 20877

JORGE & M C CABEZAS  
42 BRIGHTON DR  
GAITHERSBURG MD 20877

JOSE R & MARTA A MANCIA  
43 BRIGHTON DR  
GAITHERSBURG MD 20877

JOSE W ROMERO  
32 BRIGHTON DR  
GAITHERSBURG MD 20877

KEVIN M & BERNADETTE GINLEY  
40 BRIGHTON DR  
GAITHERSBURG MD 20877

LUCIANO & CARMEN VARGAS  
14 BRIGHTON LN  
GAITHERSBURG MD 20877

MARY M & CARY A BLOOM  
37 BRIGHTON DR  
GAITHERSBURG MD 20877

MOISES MARTINEZ  
NOEMI SUERO MELGAR  
30 BRIGHTON DR  
GAITHERSBURG MD 20877

ROBERT C JEE  
35 BRIGHTON DR  
GAITHERSBURG MD 20877

ROBERT O & O U RODRIGUEZ  
38 BRIGHTON DR  
GAITHERSBURG MD 20877

ROBERT R. HARRIS, ESQ.  
HOLLAND & KNIGHT, LLP  
3 BETHESDA METRO CENTER  
SUITE 800  
BETHESDA MD 20814

ROBERT S & B J CONWARD  
46 BRIGHTON DRIVE  
GAITHERSBURG MD 20877

SALVADOR & DINORA M ROSALES  
44 BRIGHTON DR  
GAITHERSBURG MD 20877

SCOTT COPELAND  
RST DEVELOPMENT, LLC  
6001 MONTROSE ROAD  
SUITE 710  
ROCKVILLE MD 20852

TOMASZ GEBALA  
18019 BARLEYCORN WAY  
GERMANTOWN MD 20874

WDP-RST LLC  
6001 MONTROSE RD STE 1001  
ROCKVILLE MD 20852

WILLIAM J. CHEN, ESQ.  
CHEN, WALSH, TECLER & MCCABE, LLP  
200A MONROE STREET  
SUITE 300  
ROCKVILLE MD 20850





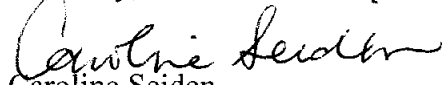
December 19, 2006

Ms. Ashby Tanner  
Law Section  
The Gaithersburg Gazette  
P.O. Box 6006  
Gaithersburg, MD 20884

Dear Ashby:

Please publish the following legal advertisement in your December 27, 2006 issue of the *Gaithersburg Gazette*.

Sincerely,

  
Caroline Seiden  
Planner

chs

ASSIGN CODE: PHA-526/Acc.#133649

### NOTICE OF PUBLIC HEARING

The Board of Appeals of the City of Gaithersburg will hold a public hearing on A-526, filed by RST Development, LLC, on

THURSDAY  
JANUARY 11, 2007  
AT 7:30 P.M.

or as soon thereafter as it may be heard in the Council Chambers at City Hall, 31 South Summit Avenue, Gaithersburg, Maryland. In accordance with Chapter 24, Article VII, Section 24-187 through 188 of the City Code, the applicant has requested an Administrative Review of a determination by City staff requiring a site plan amendment approval from the Planning Commission prior to reoccupation of existing dwellings at West Deer Park Apartments, 70 West Deer Park Road, Parcel A, Gaithersburg, Maryland.

Further information may be obtained from the Department of Planning and Code Administration at City Hall, 31 South Summit Avenue, between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday.

Caroline Seiden  
Planner

City of Gaithersburg • 31 South Summit Avenue, Gaithersburg, Maryland 20877-2098  
301-258-6300 • FAX 301-948-6149 • TTY 301-258-6430 • cityhall@gaitthersburgmd.gov • www.gaithersburgmd.gov

MAYOR  
Sidney A. Katz

COUNCIL MEMBERS  
Stanley I. Alster  
Geraldine F. Edens  
Henry F. Marraffa, Jr.  
John B. Schlichting  
Michael A. Sesma

CITY MANAGER  
David B. Hampton



MODE = MEMORY TRANSMISSION

START=DEC-19 10:37

END=DEC-19 10:38

FILE NO.=539

STN NO.	COMM.	ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
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-THE CITY OF GAITHERSBURG -

\*\*\*\*\* -PLAN AND CODE - \*\*\*\*\* 3012586336- \*\*\*\*\*



**Gaithersburg**

A CHARACTER COUNTS! CITY

## FAX TRANSMITTAL FORM

SEND TO:

Ashby Tanner  
Gazette

FAX NO.:

FROM:

Caroline Seiden

Planning & Code Administration

FAX NO.:

301-258-6336

TELEPHONE NO.:

301-258-6330

DATE:

12/19/06

TIME:

10:30

NO. OF PAGES ATTACHED:

1

MESSAGE:

Legal ad for Dec. 27, 2006 Gaithersburg  
Gazette is attached. Thanks!

**IF YOU EXPERIENCE DIFFICULTY IN RECEIVING THIS TRANSMISSION,  
PLEASE CALL 301-258-6330**

City of Gaithersburg | 31 South Summit Avenue | Gaithersburg, MD 20877-2098  
plancode@gaitHERSBURGMD.GOV www.gaitHERSBURGMD.GOV

**MAYOR**  
Sidney A. Katz

**CITY COUNCIL MEMBERS**  
Stanley J. Alster  
Geraldine E. Edens  
Henry F. Marraffa, Jr.  
John B. Schlichting  
Michael A. Sesma

**CITY MANAGER**  
David B. Humpton

**From:** Caroline Seiden  
**To:** dpodolsky@steinsperling.com  
**Date:** 12/27/2006 1:23:49 PM  
**Subject:** Administrative Review A-526

Hi Dave:

I wanted to follow up on our phone conversation this morning regarding your request that the filing of pre-hearing statements on the merits be suspended until the Board rules on the Motion to Dismiss. I am forwarding all exhibits regarding this appeal to the entire Board of Appeals and the Board's counsel, Bil Chen, this afternoon so that they may consider whether they want to entertain your request prior to the January 11 meeting.

In the meantime, please be advised that if the Board does not act on your request, the submittal deadline for a pre-hearing statement is Thursday, January 4, 2007.

Also, in addition to forwarding all additional submittals to the Board, can you please forward copies to the Board's counsel:

Mr. Bil Chen  
Chen, Walsh, Tecler & McCabe  
200A Monroe Street, Suite 300  
Rockville, MD 20850

Thank you.

Caroline

Caroline Seiden  
Planner  
Staff Liason to Board of Appeals  
Planning and Code Administration  
301-258-6330 ext. 2128

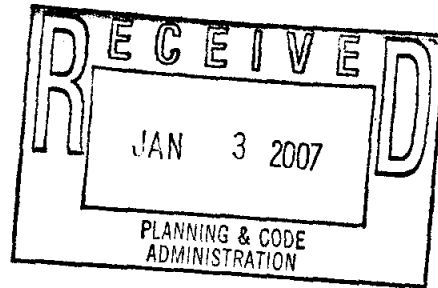
31 S. Summit Avenue  
Gaithersburg, MD 20877

cseiden@gaitthersburgmd.gov  
www.gaitthersburgmd.gov

**CC:** Chen, Bil







Robert R. Harris  
301 215 6607  
robert.harris@hklaw.com

January 2, 2007

Ms. Caroline Seiden  
City of Gaithersburg  
Board of Appeals  
31 South Summit Ave  
Gaithersburg, MD 20877

Re: Administrative Review Applicant A-526

Dear Ms. Seiden:

On behalf of RST Development, LLC, we are submitting the enclosed Petitioner's Response to Opposition to Motion to Dismiss Appeal. Please note that the Response includes an opposition to the request made by Mr. David Podolsky on behalf of the City of Gaithersburg on December 21, 2006 that the requirement for filing pre-hearing statements on the merits be suspended until after the Motion to Dismiss is decided. We are requesting that both the Motion and the case on its merits proceed at the hearing scheduled on January 11, 2007.

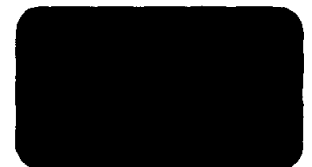
Sincerely,

Robert R. Harris

Enclosure

cc: David Podolsky

# 4276813\_v1



BOARD OF APPEALS FOR THE CITY OF GAITHERSBURG

IN THE MATTER OF  
RST DEVELOPMENT, LLC  
(WEST DEER PARK APARTMENTS)

Administrative Review  
Application Case A-526

**PETITIONER'S RESPONSE IN OPPOSITION**

**TO MOTION TO DISMISS APPEAL**

Petitioner, RST Development, LLC ("RST") by undersigned counsel, hereby files this Response in Opposition to the City of Gaithersburg's ("City") Motion to Dismiss Appeal. Petitioner timely filed its application for administrative review on November 22, 2006 in response to the Assistant City Manager's letter, which was dated November 8, 2006. The City's argument that the final decision occurred on October 23, 2006, is without merit. The letter clearly was the point at which ongoing discussions between RST and the City ended concerning the alleged requirement for, and scope of, any filing requirements for re-renting the West Dear Park Apartments.

**Statement of Facts**

Last year, RST purchased the West Deer Park apartments located at 70 West Deer Park Road, Gaithersburg, Maryland with plans of tearing down the units and building new townhomes. RST later decided instead to renovate and re-rent the apartments due to changes in the housing market. On or about September 25, 2006, Scott Copeland of RST first discussed the intention of re-renting the apartments with Greg Ossont of the City of Gaithersburg Planning and Code Administration Staff and Assistant City Manager Fred Felton ("Staff"). At that time Staff told Mr. Copeland that the renovation and re-renting would not require any further permits or approvals from the City.



Later, on or about October 18 and 19, 2006, Mr. Ossont indicated to RST instead that there might be a filing requirement. While Staff did not know yet what would be appropriate, any filing was to be minor and easily submitted for a December Planning Commission review. A meeting was then scheduled with Staff for October 23, 2006 to discuss the issue.

At the October 23, 2006 meeting, Mr. Stan Abrams, a private attorney who represents the City in various matters, indicated his belief that RST would need to file an application with the City Planning Commission in order to re-rent the apartments because he believed the project was somehow a non-conforming use due to the number of existing parking spaces. Staff indicated that such a filing could be done easily and almost immediately through a minor Site Plan Amendment focused only on the parking issue. RST expressed its belief that no filing was required and explained the basis of its belief. (See RST's Prehearing Submission in this proceeding for the specific reasons why RST expressed its position to the contrary.) Mr. Abrams did not indicate whether the Mayor and Council or the Planning Commission agreed with his advice that an application of some type would be required but did advise RST that they could contact the Mayor if they wished to discuss the matter. (When RST later sought to discuss the matter with the Mayor to seek a resolution, the Mayor declined to meet at that time).

Following the October 23, 2006 meeting, RST and Mr. Ossont met and then continued to exchange emails concerning the exact nature of a filing that might be required. Mr. Ossont indicated that he would speak with Staff and clarify what needed to be done.

By letter of November 8, 2006, Assistant City Manager Fred Felton concluded:

As discussed during our October 23, 2006 meeting and reiterated during our telephone conversations on November 3, 2006, the City Attorney's office has determined that you must obtain approval for site plan amendment from the

Planning Commission prior to be [sic] being permitted to reoccupy the existing dwelling at West Deer Park Apartments.

Additionally, the letter stated that attached responses from Mr. Ossont clarified RST's submission requirements. That attachment called for an extensive amount of information, much more than had been indicated immediately following the October 23, 2006 meeting and much more than could be submitted by November 9 as would have been required to have the matter set for the Planning Commission's December, 2006 meeting as discussed on October 23, 2006.

On November 22, 2006, RST filed a petition for administrative review of the November 8, 2006 letter before the Board of Appeals for the City of Gaithersburg. Subsequently the City filed a motion to dismiss the appeal as untimely. RST now opposes the City's motion.

### **Argument**

#### **I. The November 8, 2006 Letter from the Assistant City Manager Is an Appealable Decision**

The City argues that RST's appeal is untimely because the November 8, 2006 letter was not the City's final determination on the site plan amendment matter. Instead, the City erroneously asserts that the final determination on RST's site plan amendment and submission requirements was made at an informal meeting with staff on October 23, 2006, and that the November 8 letter merely confirmed a prior decision. The circumstances and ongoing discussions leading up to the November 8 letter, however, clearly show that it was the November 8 letter that ultimately announced the City's final decision on RST's required filings.

Under the Gaithersburg City Code, ("Code") petitions for administrative review "may be initiated by any person aggrieved by a final order, requirement, decision or determination" of "any administrative official or department of the city government or the planning commission in

the enforcement and administration” of the City’s zoning code provisions. Gaithersburg City Code §§ 24-187, 24-188. Furthermore, the Code provides that a petition must be filed “within seventeen (17) days of the date of the action from which the appeal was filed.” § 24-187.

In order to appeal an administrative decision, the Code is clear that the decision must be final. An agency’s decision “is final if it determines or concludes the rights of the parties, or if it denies the parties’ means of further prosecuting or defending their rights and interests in the subject matter before the agency.” Crofton Partners v. Anne Arundel County, 99 Md. App. 233, 244, 636 A.2d 487, 493 (1994) (quoting Md. Comm’n on Human Relations v. Baltimore Gas & Electric Co., 296 Md. 46, 56, 459 A.2d 205, 211 (1983)). Nevertheless, “not every administrative order which determines rights and liabilities, or from which legal consequences flow, is final.” Holiday Spas v. Montgomery County, 315 Md. 390, 396, 554 A.2d 1197, 1200 (1989). “[T]o be final, an administrative order must also leave nothing further for the agency to do.” Id. (internal quotations omitted); see also Kim v. Comptroller of the Treasury, 350 Md. 527, 534, 714 A.2d 176, 179 (1998). Additionally, “implicit in the requirement” that the decision be final “are the correlative requirements that the aggrieved party know that the decision has been made and that the decision is final.” Crofton Partners, 99 Md. App. at 243, 636 A.2d at 492.

In Crofton Partners, the Court, like the Board of Appeals in this case, was asked to determine which in a series of agency actions constituted the final agency decision and thus began the clock for purposes of filing a timely appeal of that decision. Ultimately, the Crofton Partners Court held that a letter which fully informed the developer of the county’s decision was the final appealable decision because it represented an end to a series of discussions between the developer and the county and wholly concluded the rights of the developer. Id. at 245, 636 A.2d

at 493. Prior to the letter's mailing, the developer had met with county officials and was verbally advised that the county would not consider his application. Id. at 239, 636 A.2d at 490. The developer then sent a letter to the county, which continued the discussion between the developer and the county, asking for concurrence with the developer's view. Id. The county responded with the letter that was eventually appealed. The Court held that this letter constituted the final appealable agency decision, despite the fact that the county's decision had been communicated to the developer in a prior meeting, because the letter informed the developer that any further claims "would be futile." Id. at 245, 636 A.2d at 493.

The November 8 letter to RST similarly represents an end to the series of discussions between RST extending from September until November 8, 2006. The discussions between September and the November 8, 2006 letter reflected the changing nature of the City's thinking: first, the City took the position that no filing would be required; second, they stated that only a minor site plan amendment with very limited information would be required; and finally as reflected in the November 8 letter, the City ultimately decided that a full-blown Site Plan Application would be required as if the project were not already fully constructed. It was not until the November 8 letter that the City fully and finally informed RST of the City's full decision.<sup>1</sup> Further, the November 8 letter constitutes the City's final decision despite the fact that an attorney representing the City stated his belief to RST at the October 23 meeting as to the

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<sup>1</sup> It is also important to note the similarities between the language of the Crofton Partners letter and the letter in this case. To the extent that the City argues that the November 8 letter's reference to the prior meeting shows that the City had already made its final decision, that argument is unfounded. Both the Crofton Partners letter and the November 8 letter here begin by referring to a prior meeting or discussion in which the agency came to a conclusion and communicated that conclusion to the developer. Crofton Partners, 99 Md. App. at 240, 636 A.2d at 490. In Crofton Partners, this language did not affect the Court's decision that it was the letter which constituted the final agency decision. Id. at 244-45, 636 A.2d at 492-93.

non-conforming use status of the project because, at the October 23 meeting, the City had not yet determined what any filing requirements would be.

The October 23 meeting can be distinguished from the meeting in Badian v. Hickey, 228 Md. 334, 179 A.2d 205 (1962), as cited to by the City. In Badian, the order which constituted a final appealable decision was an oral adoption of a resolution at a formal Montgomery County Council meeting. That formal, public meeting there, including the adoption of an official resolution, was substantially more formal and final than the informal meeting between RST and the City Staff on October 23, 2006 at which a lawyer for the City was indicating his belief without a decision by the Mayor and Council. This case also can be distinguished from United Parcel Service, Inc. v. People's Counsel for Baltimore County, 336 Md. 569, 650 A.2d 226 (1994), on which the City relies to argue that the November 8 letter merely confirmed or referred to a determination that had already been made at the October 23 meeting. In UPS, the Court held that a letter written by the Zoning Commissioner in response to a citizen letter alleging that a UPS building's use was non-conforming was not appealable as a final decision because the letter "simply confirmed or reaffirmed his prior 'approval' or 'decision' that UPS's use was a permitted one." Id. at 582, 650 A.2d at 233. The UPS case is totally inapplicable here for two reasons. First, the citizen was not a party to the permit proceeding and simply questioned the permit long after its issuance. Second, there were no ongoing discussions there between the citizen and the Zoning Commissioner. The Zoning Commissioner had already formally determined the building's use during UPS's application process for a building permit, which occurred several months prior to an independent citizen letter. Third, in UPS, the citizen's letter constituted an objection to the decision that the Zoning Commissioner had made and the Zoning Commissioner responded with an explanation of his decision to a third party. Id. at 573, 650

A.2d at 228. Here, the November 8 letter was not an explanation to a third party of a prior decision, but the actual decision itself including the City's transmittal of the filing requirements to the applicant.

Furthermore, the comments of the attorney for the City at the October 23 meeting were still subject to agency consideration. As outside counsel to the City, Mr. Abrams may advise the City as to his view of the law but he does not make City decisions. Just like any other client, the City was free to either follow or disregard the advice of Mr. Abrams. While Mr. Abrams stated to RST, at the October 23 meeting, his belief as to what would be required of RST for it to renovate and rent is property, Mr. Abrams' stated view was not a final City action. Evidence of the open-ended nature of the October 23 discussion was demonstrated further by the continued evolution of the position espoused at the meeting concerning what type of submission RST might have to make. At the October 23 meeting, Staff stated that only a minor site plan amendment might be required. By contrast, the November 8 letter announcing the City's decision, together with its attachment, concluded that a much more comprehensive application would be required. Until this final determination was made by the Assistant City Manager, RST could not know exactly what the City required of it. As the Crofton Partners court held, to be a final decision, the aggrieved party must know that a decision has been made and that it is a final decision. See Crofton Partners, 99 Md. App. at 243, 636 A.2d at 492.

The fact that RST was still awaiting the City's final conclusions on the submission requirements also shows that the City had more to do following the October 23 meeting. Maryland law is clear that an agency decision or action cannot be considered final unless there is nothing further for the agency to do. See Holiday Spas, 315 Md. at 396, 554 A.2d at 1200; Kim, 350 Md. at 534, 714 A.2d at 179. In Holiday Spas, the Court held that even though the



Montgomery County Commission on Human Relations had decided the issue of liability in a discrimination case, the Commission's order could not be considered final because it had yet to resolve the issue of damages. Holiday Spas, 315 Md. at 396, 554 A.2d at 1200. Similarly, in Kim, the Court held that an oral order by the Maryland Tax Court was not final because the agency still had to file a written order and mail it to the parties. Kim, 350 Md. at 534, 714 A.2d at 179. Likewise, in this case, the City still had more to do in that Mr. Ossont told RST following its request for clarification of the initial proposed filing requirements that he would talk to the Staff and obtain answers for RST.

The City's current position -- that a final decision was made at the October 23 meeting -- begs the obvious question: if the City really believed statements made at the October 23 meeting were the final appealable decision, then why did the City send the letter on November 8? Clearly, both the position advocated at that meeting by the City's attorney and the particular filing requirements that would apply were not finally resolved at that time. The November 8 letter was the final resolution. There is good reason that official decisions such as this are rendered in writing. If oral discussions by Staff were final actions, it would be difficult if not impossible to determine during continuing discussions between private parties and Staff, the point at which a City decision is deemed final. In this case, was it final in September when Staff stated that no Site Plan Amendment was required? Was it final when they indicated in October that only a minor Site Plan Amendment with a limited amount of information would be required, and that it could be presented to the Planning Commission for quick action in December? A private party cannot be required to speculate when there is a final, appealable decision. Such a practice would require a party to file an appeal every time Staff provided comments in an on-

going matter. Here, the November 8 letter constituted the end of such discussions and the City's announcement of its final decision.

II. The Board of Appeals Should Not Defer Consideration of the Merits of This Case

In his transmittal letter to the Board of Appeals, dated December 21, 2006, Counsel for the City asks the Board to defer the requirement for filing pre-hearing statements on the merits until after a determination of the Motion to Dismiss. On behalf of RST, we strongly oppose that request. First, the rules of procedure required RST to file its pre-hearing statement 15 days before the scheduled January 11, 2007 Board of Appeals hearing. That rule required the filing be made by December 26, 2006. With the Christmas holiday occurring immediately prior to that and abbreviated hours by the City government, Petitioner had to prepare and file that pre-hearing statement by Friday, December 22. The work was essentially done by the time we learned of the City's December 21 Motion to Dismiss. Therefore, there is no workload saving or time efficiency by now deferring that filing requirement until later.

Second, as reflected in that pre-hearing submission, the decision of the City reflected in the November 8 letter is clearly erroneous, and any delay in the adjudication of the appeal of that decision would be extremely prejudicial to RST. The City's position that the existing multi-family units on this property constitute a "non-conforming use" is so far beyond reason that we do not see how the Board of Appeals could possibly support it. RST has been attempting to undertake planned renovation work to this property since last summer. Each month is costing them many thousands of dollars in interest carry and other expenses. The November 8 decision is bad enough; there should be no further delay in the Board's reversal of that unjustified decision.

### **Conclusion**

Wherefore, Petitioner RST respectfully requests that the Motion to Dismiss be denied because RST filed a timely petition for review of the November 8, 2006 decision. RST further requests that this motion be dismissed summarily; however, if the Board is to hear argument on this motion at the January 11, 2007 meeting, RST respectfully requests that the Board also conduct a hearing on the merits of the case at that time.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "Robert R. Harris", is written over a horizontal line.

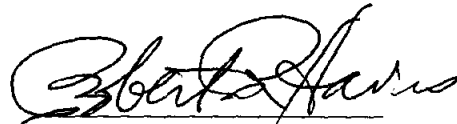
Robert R. Harris, Esq.  
Holland & Knight LLP  
3 Bethesda Metro Center  
Suite 800  
Bethesda, MD 20814  
Attorney for Petitioner RST Development, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Petitioner's Response in Opposition to Motion to Dismiss Appeal was sent via US First Class on this 2 day of January, 2007 to the following:

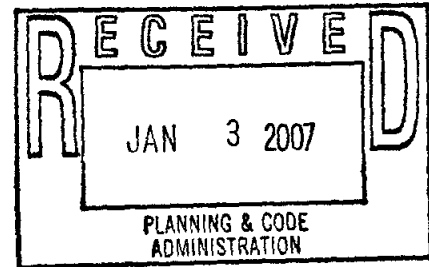
David R. Podolsky, Esq.  
25 West Middle Lane  
Rockville, Maryland 20850

*facsimile*

  
Robert R. Harris, Esq.

# 4273266\_v1

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January 3, 2007

Of Counsel to: Stein, Sperling, Bennett  
De Jong, Driscoll & Greenfeig, P.C.

City of Gaithersburg  
Board of Appeals  
c/o Caroline Seiden  
31 South Summit Avenue  
Gaithersburg, Maryland 20877

RE: Administrative Review Application A-526

Dear Ms. Seiden:

Enclosed herewith is a pre-hearing submission that we are filing pursuant to Rule 2.4.b. of the Board's Rules of Procedure. By filing the pre-hearing statement, it is not the intention of the City to waive or in any way diminish its Motion to Dismiss.

The City reiterates its request that the Motion to Dismiss be considered in advance of any meeting at which this matter might be considered on the merits of the Petition, in the event the Motion to Dismiss is not granted. We have received a copy of the Petitioner's Response to our Motion to Dismiss. Given the limited time before the January 11, 2007 Board meeting, it is not likely that we could submit a written rebuttal to the Petitioner's Response in time for the Board to fully consider our rebuttal before the January 11, 2007 meeting. Therefore, unless the Board grants the Motion to Dismiss based on the pleadings submitted to date, we request an opportunity to present our rebuttal at the January 11, 2007 Board meeting.

Thank you for your consideration of the City's position in this matter.

Very truly yours,

A handwritten signature in cursive script that reads "David Podolsky".

David R. Podolsky

DRP:ag

Enclosure

cc: Robert Harris, Esquire  
William Chen, Esquire



BEFORE THE BOARD OF APPEALS FOR THE CITY OF GAITHERSBURG

IN THE MATTER OF  
RST DEVELOPMENT, LLC  
(WEST DEER PARK APARTMENTS)

Administrative Review  
Application Case A-526

**PRE-HEARING STATEMENT OF RESPONDENT –  
THE CITY OF GAITHERSBURG**

The City of Gaithersburg, Office of the City Attorney and the Planning & Code Administration, Respondents in the above referenced administrative appeal (“Respondents”), through undersigned counsel, oppose the petition for administrative review filed by Petitioners. Pursuant to Section 2.24(b) of the Board of Appeals’ Rules of Procedure, Respondents file this prehearing statement and state as follows.

(1) Statement of grounds upon which petition is based.

Petitioner’s arguments appear to be based on two positions. First, because petitioner intends only minor interior modifications to the apartment use, and has a site plan approval for that use from 1970, no site plan submission can be required under the provisions of the zoning ordinance in order to reoccupy the apartments. Second, because the prior multi-family use of the subject property continues to be a permissible use in the R-20 zone where it is located, it is conforming, and therefore nothing can be required of the petitioner in order to reoccupy the apartments. Under petitioner’s scenario, although the apartments were vacant for at least ninety (90) days<sup>1</sup>, the City cannot require a site plan amendment, the grant of a parking waiver, or even the issuance of a use and occupancy permit. Petitioner’s arguments ignore what the City has actually told

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<sup>1</sup> Under Section 24-17(c) of the City Code, “If any such nonconforming use of land ceases for any reason for a period of more than ninety days, any subsequent use of such land shall conform to the regulations specified by this chapter for the zone in which such land is located.”



petitioner it needs to obtain, as well as certain elements of the City code and their relevance to this project.

**Burden of proof.** Section 24-189 of the City's Zoning Ordinance, addressing the findings required for the Board of Appeals to grant a petition for administrative review, sets forth the petitioner's burden of proof in this matter. Specifically, the petition may be granted only where the petitioner demonstrates that the determination appealed from "was clearly erroneous or not in accordance with the law." *Id.* In looking at statutory construction, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414, 65 SCt 1215, 1217, 89 L.Ed. 1700, 1702 (1945). *See also, Beth Tfiloh Congregation of Baltimore City, Inc. v. Glyndon Community*, 152 Md.App. 97, 831 A.2d 93 (2003), *citing, Ideal Fed. Savings Bank v. Murphy*, 339 Md. 446, 461, 663 A.2d 1272 (1995). Thus, the standard of review is very high, and the City's interpretation of the Zoning Ordinance in this case is entitled to a great deal of deference.

**History of the project.** The original garden style apartment use plan was approved as S-236 on October 12, 1970. The apartments have existed in their current form since 1973. Upon purchasing the property in April, 2004, petitioner immediately sought to redevelop the property into a townhouse community under the R-20 TND option. This effort involved the displacement and relocation of 198 families who were occupying the apartments at the time of petitioner's purchase. This also involved a significant financial contribution from the City, including the appropriation of \$200,000.00 in partnership with HOC to create a housing purchase initiative fund for

displaced tenants. That appropriation was based in part on anticipated permit fees to be collected from the developer.<sup>2</sup>

On January 4, 2006, petitioner obtained final site plan approval from the Planning Commission to move forward with the town house development.<sup>3</sup> The apartments were finally vacated completely on July 6, 2006, when the last remaining tenant moved out. The apartments remain vacant at this time.

In September, 2006, petitioner informed the City that it believed it could no longer afford to proceed with the town house project. Petitioner thus intended to reoccupy the apartments. Petitioner sought guidance from the City as to what would be required of petitioner in order to accomplish this reoccupation. It is from the City's decision on this point that petitioner appeals.<sup>4</sup>

**Zoning History.** The subject property retains its original R-20 zoning. The parking for the apartments in 1970 was calculated under the original 1965 zoning ordinance requirements that were applicable to the apartment community. In 1980, those original parking requirements were amended by ordinance number O-13-80. As a result of the amendment, the parking at the apartments became non-conforming: the number of off-street parking spaces required for this use under current (1980) standards is 405,

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<sup>2</sup> Although the City has spent approximately \$60,000.00 on the housing initiative fund to date, no permit fees have been collected since the project has not moved forward.

<sup>3</sup> The PC&A issued the signed Site Development Approval January 11, 2006.

<sup>4</sup> In its prehearing statement, petitioner states that the November 8, 2006 letter from Mr. Felton stated that petitioner was required to obtain approval for a site plan amendment prior to being permitted to reoccupy the apartments, but that "the letter contains no rationale for the City's position." Prehearing statement, pg. 2. This statement is disingenuous. The November 8 letter contains no rationale because that was not the issuance of the City's position. The City provided petitioner with a full rationale for its determination at a face to face meeting held on October 23, 2006. As set forth in respondents' Motion to Dismiss, it was the October 23, 2006 determination that was the appealable decision, not the November 8 letter, which merely restated the City's October 23 determination.



while the total number of spaces existing at the property is only 375.<sup>5</sup> However, since the operation of the apartments had neither ceased nor changed in any way when the parking requirements were amended, the amended parking requirements did not become applicable to the apartments at the time of the amendment.

**Proposed Reoccupation.** Petitioner argues that, since multi-family is a permissible use in the R-20 zone, there is no non-conforming use.<sup>6</sup> Therefore, the apartments may be reoccupied by right, without the need for bringing anything into conformity. Petitioner's argument is too narrow.

*Non-conforming Uses Generally.*

The change in the parking requirements, which requires additional parking than what currently exists at the property, has created a non-conforming use. A non-conforming use is a use which lawfully existed prior to the enactment of a zoning ordinance or amendment thereto which is maintained after the enactment of the ordinance or amendment, and does not comply with current zoning restrictions applicable to the development. 1 Anderson, American Law of Zoning, §6.01, 4<sup>th</sup> ed. A lawful, non-conforming use is established if at the time of the adoption of a zoning ordinance, the property was being used in a lawful manner, but by later legislation, including an amendment, it became non-permitted. Trip Associates v. Mayor and City Council of

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<sup>5</sup> Parking areas are an important and required *use* of improved property. In this context, the definition of "non-conforming use" in the City Zoning Ordinance (§24-1) refers not only to the use of buildings but also to the use of "*land*:" "[a] use of a building *or of land* lawfully existing at the time this chapter or the previous zoning ordinance became effective and which does not conform with the use regulations of the zone in which it is located."

<sup>6</sup> Section 24-19 states "[i]f a lawful use of a structure or of a structure and premises in combination, exists on March 22, 1965, or on the effective date of an amendment to this chapter, that would not be allowed in the zone under the terms of this chapter...." Contrary to petitioner's assertions, the City has not alleged that the *type* (*i.e.* multi-family) of use of the structure or structure and premises would not be allowed in the R-20 zone today. Accordingly, the provisions of §24-19 have not been applied to petitioner's plan.

Baltimore, 898 A.2d 449 (Md. 2006). Thus, after the amendment to the zoning ordinance to increase the parking requirements applicable to the multi-family use at this project, this use would not be permitted in its current form due to insufficient parking.

*Totality of Use of Land*

In looking at the use, it is necessary to look at the totality of the use, not just the use of the buildings on site. This is clearly expressed in the definition of “non-conforming use” in the City Zoning Ordinance (§24-1) which applies to the status of non-conforming use to not only buildings, but also to the “land.” Again, although this rationale is not set forth in the November 8, 2006 letter, this rationale was fully explained to petitioner at the October 23 meeting. Although petitioner disputes this position, and states that it is contrary to Maryland law, petitioner has failed to cite any authority to contradict this very basic premise of land use principles.

Under section 24-17(c) of the City’s Zoning Ordinance, if a non-conforming use of land ceases for a period of more than ninety (90) days, *for any reason*, any subsequent use of the land shall conform to the regulations specified in Chapter 24 for the zone in which such land is located. The subsequent use can include the same use. The regulations in Chapter 24 include the parking requirements attendant to each use. The occupancy, and therefore the use, of the subject property as multi-family residential has ceased for more than ninety (90) days, evidenced by the vacancy of the building units as of July 6, 2006 and the discontinuance of utility services to the buildings and apartments. Therefore, under 24-17(c), the subsequent use must conform to the current parking requirements contained in Chapter 24.

Petitioner also argues that the provisions of 24-168 do not apply in this case.

Contrary to petitioner's argument, section 24-168 of the Zoning Ordinance is relevant to this analysis. Under that section,

...nor shall any use be established, altered or enlarged under circumstances which require the issuance of a use and occupancy permit under this chapter, upon any land, until a site development plan for the land upon which such ... use is to be erected, moved, added to, altered, established or enlarged has been approved by the city planning commission.

The total use has been discontinued for more than ninety (90) days, and therefore the total use must conform to the current requirements. §24-17(c). In order to comply with the parking requirements, the use either must be altered or enlarged to add or reconfigure the parking, or to alter the number of units so as to reduce the number of required parking spaces to conform to the present conditions. Thus, under section 24-178, a use and occupancy permit will be required as part of the re-establishment of the total use. The parking required by Chapter 24 is an element attendant to the multi-family use. Parking is required as part of the use; if that part of the use is non-conforming, a non-conforming use of the land exists. As indicated to petitioner, that conformance must be demonstrated in one of two ways: either by amending the site plan to show a reconfiguration of the parking to meet the current requirements (§24-219) in accordance with §24-168, or by obtaining a waiver from the current parking requirements (*see*, §24-222A).

*Parking as an Accessory Use*

Alternatively, even if parking is not considered a use in itself or an essential element of the totality of the use in combination with the apartment use, arguments which the City does not concede, at the very least the parking attendant to and required as part

of the apartment use is an accessory use to the principal apartment use. A non-conformity of the accessory use will lead to the same required result.

The City Zoning Ordinance defines “accessory use” as [a] use on the same lot with and of a nature customarily incidental and subordinate to, the principal use of the main building or lot.” §24-1. The parking requirements in §24-219 specify the parking required for a multi-family use. Thus, the use of the land for parking is incidental and subordinate to the principal multi-family apartment use.

Section 24-17(c) states that, if a non-conforming use of land ceases for a period of more than ninety (90) days, for any reason, *any subsequent use* of the land shall conform to the regulations specified in Chapter 24 for the zone in which such land is located. Once the parking requirements were amended in 1980, the accessory parking use became non-conforming. Section 24-17(c) clearly states that *any* subsequent use of the land must conform. Therefore, since the accessory parking use has been discontinued for 90 days, any subsequent use – whether it is the accessory or principal use – must conform to the requirements of Chapter 24. The principal use cannot operate without the accessory parking use. The parking use is non-conforming. Thus, in order to reoccupy, the parking must be brought into conformance, via either a parking waiver or an amendment to the site plan reconfiguring the parking.

- (2) *Copies of all reports, studies and other documents and plans intended to be introduced at the hearing.*

1970 Site Plan, S-236

July 6, 2006 electronic mail from Sara McLaughlin, RST, indicating date of final vacancy.

Ordinance No. O-2-65, including parking requirements applicable when site plan was approved.

Ordinance No. O-13-80, amending parking requirements

Current parking requirements, §24-219, City Code

- (3) Summary of expert testimony and credentials which will be proffered at the hearing.

Respondents do not intend to call any experts at this time.

- (4) Identity of all witnesses who will testify.

Respondents reserve the right to call the following persons to testify:

Stanley D. Abrams, Esq.  
Abrams & West, P.C.  
4550 Montgomery Avenue, Suite 760N  
Bethesda, Maryland 20814

Cathy G. Borten  
City Attorney  
City of Gaithersburg  
31 South Summit Avenue  
Gaithersburg, Maryland 20877

Greg Ossont  
Director, Planning & Code Administration  
City of Gaithersburg  
31 South Summit Avenue  
Gaithersburg, Maryland 20877

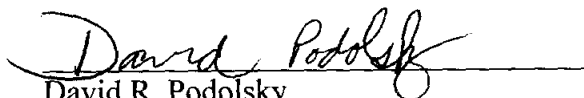
Fred Felton  
Assistant City Manager  
City of Gaithersburg  
31 South Summit Avenue  
Gaithersburg, Maryland 20877

Trudy Schwarz  
Community Planning Director  
City of Gaithersburg  
31 South Summit Avenue  
Gaithersburg, Maryland 20877

(5) Estimated time required for presentation

This appeal is from the City staff's interpretation of the City Code. As such, it is a challenge to the interpretation of a law, rather than a dispute of fact. Therefore, respondents intend to submit on the brief, unless petitioner raises questions of fact at the hearing not previously raised or unless the Board has questions for respondents.

Respectfully submitted,



David R. Podolsky  
Counsel for Respondents  
25 West Middle Lane  
Rockville, Maryland 20850  
301-838-3216


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Prehearing Statement was served this 3rd day of January, 2007, by first class mail, postage prepaid, to:

Robert R. Harris, Esq.  
Holland & Knight LLP  
3 Bethesda Metro Center  
Bethesda, Maryland 20814

and to

William J. Chen, Jr., Esq.  
Counsel to the Board of Appeals  
200 Monroe Street  
Suite 300  
Rockville, Maryland 20850

  
David R. Podolsky

## Ordinance No. 0-2-65

AN ORDINANCE REPEALING AND REENACTING THE ZONING ORDINANCE OF THE TOWN OF GAITHERSBURG, MARYLAND, AND PROVIDING FOR THE ADMINISTRATION, ENFORCEMENT, AND AMENDMENT THEREOF, IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 66B, TITLE 2, ANNOTATED CODE OF MARYLAND.

**Whereas** Article 66 B, Title 2, Annotated Code of Maryland, empowers the Town to enact a zoning ordinance and to provide for its administration and enforcement within its own corporate limits; and

**Whereas** the Mayor and Council deem it necessary, for the purpose of promoting the health, safety, morals, or general welfare of the Town to enact such an ordinance; and

**Whereas** the Mayor and Council, pursuant to the provisions of Article 66B, Title 2, Annotated Code of Maryland, have appointed a Planning Commission to recommend the boundaries of the various original zones and appropriate regulations to be enforced therein; and

**Whereas** the Planning Commission has made a preliminary report and held a public hearing thereon, and submitted its final report to the Mayor and Council; and

**Whereas** the Mayor and Council have given due public notice of a hearing relating to zones, regulations, and restrictions, and have held such a public hearing; and

**Whereas** all requirements of Article 66B, Title 2, Annotated Code of Maryland, with regard to the preparation of the report of the Planning Commission and the subsequent action of the Mayor and Council have been met;

NOW THEREFORE BE IT ENACTED BY THE MAYOR AND TOWN COUNCIL OF GAITHERSBURG, MARYLAND:

for frontage requirements, and shall be computed on the basis of the building structure in its entirety, taking into consideration the number of lots upon which the structure is located, provided, however, that the minimum width of each dwelling unit within the structure shall be 18 feet.

#### **Height Regulations**

Buildings may be erected up to 35 feet in height except that:

The height limit for dwellings may be increased up to 45 feet and up to 3 stories provided there are side yards, each of which is 10 feet or more, plus 1 foot or more of side yard for each additional foot of building height over 35 feet.

A public or semipublic building such as a school, church, library or hospital may be erected to a height of 60 feet from grade provided that required front, side and rear yards shall be increased 1 foot for each foot in height over 35 feet.

#### **Special Provisions for Corner Lots**

Of the two sides of a corner lot, the front shall be deemed to be the shorter of the two sides fronting on side streets.

The side setback on the side facing the side street shall be 35 feet or more for both main and accessory buildings.

For subdivisions platted after the enactment of this ordinance, each corner lot shall have a minimum width at the front setback line of 100 feet or more.

### **E. R-20 Zone, Medium Density Residential**

This zone is intended to stabilize and protect medium-density areas by reducing hazards to the living environment and to provide for a varied, denser urban residential pattern suitable to the needs of the population by encouraging a range of dwelling types.

a. The following uses are permitted by right:

1. all uses permitted in the R-T Zone;
2. two-family and multiple-family dwellings;
3. boarding houses and rooming houses;
4. fraternity and sorority houses;
5. accessory uses and structures, including but not limited to:
  - a. accessory uses and structures permitted in the R-90 zone;
  - b. business office for the administration of multi-family dwellings containing more than 24 dwelling units;
  - c. swimming pools for the exclusive use of the residents of the dwelling or dwellings located on the same parcel or lot;
  - d. on-site signs, restricted to one name plate not exceeding 2 square feet in area which indicates the name of the occupant of the premises, and 1 unlighted sign not exceed-



ing 6 square feet in area which indicates the prospective sale or rental of the property on which it is located.

- b. The following uses are permitted as special exceptions when approved by the Board of Appeals:  
Public or private community swimming pools.

#### **F. R-H Zone, Planned Residential**

The purpose of this zone is to provide suitable sites for relatively high density residential development while retaining the open character of existing residential areas. Further, it is intended that this zone will provide the maximum possible freedom in the design of structures and their grouping, and will permit flexible and imaginative layout.

- a. The following uses are permitted by right after the Planning Commission approves a Site Development Plan for the lot or tract on which the uses will be located:
1. all uses permitted in the R-T Zone;
  2. all uses permitted in the R-20 Zone, Medium Density Residential;
  3. accessory uses and structures permitted in the R-20 Zone, and on-site signs not exceeding 12 square feet in area, lighted, which identify the buildings or a permitted use but not an accessory use;
- b. The following uses are permitted when approved by the Planning Commission as part of the Site Development Plan, and when approved by the Board of Appeals as special exceptions:
1. all uses permitted as special exceptions in the R-20 Zone;
  2. retail sales and consumer service establishments incidental to and located within a multifamily structure, limited to drug store, restaurant, newsstand, barber and beauty shops, valet shops, and delicatessens, provided that:
    - a. the uses are primarily for service to and the convenience of residents of the structure or project in which they are located;
    - b. such establishments shall not be located above the ground level floor;
    - c. tenants of the building are protected from noise, traffic, odors, and interference with privacy.
- c. Procedure for approval:
1. before any uses are permitted in this zone, an application for approval of a Site Development Plan shall be submitted to the Planning Commission. The application shall show in detail the plans for development of the lot or tract, including specifically:
    - a. the topography of the lot and surrounding area, showing the location of woodland, streams, and water areas, and other significant features of the land;

**TABLE OF LOT, YARD, LOT COVERAGE, AND HEIGHT REQUIREMENTS †**

Zone	TABLE OF LOT, YARD, LOT COVERAGE, AND HEIGHT REQUIREMENTS †										
	Minimum Lot			Minimum Yards (in feet)			Maximum Lot Coverage (%)	Maximum Height	Minimum Green Area (%)	Minimum Distance Between Main Buildings	
	Area sq. ft.		width (in ft.)								
Total	For more than one dwelling unit: per dwelling unit	Front		Rear	Side						
R-A	40,000		150	50	50	25	20	2½ stories or 35 ft.	60	50 ft.	
R-R	20,000		100	40	50	25	25		60	50 ft.	
R-90	9,000		75	30	30	10	30		50	20 ft.	
R-20	9,000	1st 2 dwelling units 4,000 each; each additional dwelling unit 2,000	75 + 10 for each 4 dwelling units over 2	30*	30*	10*	40	3 stories or 45 ft.	50	50* ft.	
R-H	5 acres	1,400	250	30*	30*	10*	12		unlimited	55	50* ft.
R-O	9,000		75	30	20	none, except yard adjoining residential zone shall be as provided in that zone	40		45 ft.	10	none
R-T‡							40				
C-P‡											
C-1				30	20						
C-2				none			40	45 ft.	none	none	
C-2 A	5 acres		250	none			none	110 ft.	none	none	
I-1	none	none	50	none, except yard adjoining residential zone shall be as provided in that zone, and yard adjoining a numbered State or Federal highway shall be 50 feet				unlimited			
I-2	none	none	100				60	45 ft.	none	none	
							75	110 ft.	none	none	
I-3	2 acres	none	100	50*	50*	50*	25	110 ft.	none	50*	

† See Text for Respective Zones

\* Shall Be Increased One Foot for Each Foot of Building Height Over 20 Feet

† See Text for Respective Zones

\* Shall Be Increased One Foot for Each Foot of Building Height Over 30 Feet.

such as to make it evident that emission was not reasonably preventable.

6. Odor: No emission of objectionable odors outside the lot lines shall be permitted, except during periods when breakdown of equipment occurs such as to make it evident that the emission was not reasonably preventable.
  7. Toxic gases: No emission of noxious, toxic or corrosive fumes or gases shall be permitted, except during periods when breakdown of equipment occurs such as to make it evident that the emission was not reasonably preventable.
- d. The Table of Lot, Yard, Lot Coverage and Height Requirements is hereby adopted by reference and declared to be a part of this ordinance.

## **Section 2. Supplementary Zone Regulations**

### **A. Off-Street Parking and Loading**

1. There shall be provided, at the time of the erection or enlargement of any main building or structure, minimum off-street parking space, either within or without a structure requiring a rectangular area 10 x 20 feet per space.
2. Interior driveways and entrance and exit driveways shall be at least 20 feet in width to allow safe and expeditious movement of vehicles, and entrance and exit driveways shall be separately provided wherever possible. Interior driveways for one way vehicular movement only may be reduced to not less than 12 feet.
  - a. Dwelling: one and two-family, 1 space per dwelling unit; three- or more family, 1 1/4 spaces per dwelling unit; not more than 50% of the required yard set back area shall be used for such purpose.
  - b. Theater, auditorium or stadium: One automobile parking space for each 4 seats or similar vantage accommodations provided, plus 1 space for each 4 employees.
  - c. Hospitals, nursing homes, and similar medical institutions: 1 space for each 600 square feet of floor space, plus 1 space for each 3 employees.
  - d. Eleemosynary and philanthropic institution: 1 parking space for each 2 employees, plus 1 parking space for each 400 square feet of floor space for residents and visitors.
  - e. Educational institution: 1 parking space for each 2 employees, including teachers and administrators, plus sufficient off-street space for the safe and convenient loading and unloading of students, plus additional facilities for all student parking, and if a stadium or other spectator area is located on the site, such additional parking space as required for a theater, auditorium or stadium.
  - f. Hotels, rooming houses, apartment hotels, and motels: 1 parking space for each unit, and 1 parking space for each 3 employees.

ORDINANCE NO. 0-13-80

AN ORDINANCE TO ADD ARTICLE X TO CHAPTER 24 OF THE CITY CODE (THE ZONING ORDINANCE) TO REGULATE AND ESTABLISH STANDARDS FOR OFF-STREET PARKING AND LOADING AND ENFORCEMENT THEREOF AND TO REPEAL EXISTING SECTION 24-161 OF ARTICLE IV AS BEING INCONSISTENT THEREWITH.  
TEXT AMENDMENT T-190.

BE IT ORDAINED, by the Mayor and Council of Gaithersburg, in public meeting assembled, that a new Article X, entitled Off-Street Parking and Loading is hereby added to Chapter 24 of the City Code to read as follows:

ARTICLE XI

OFF-STREET PARKING AND LOADING

Sec. 24-214. General Requirements.

(a) There shall be provided, at the time of erection, enlargement or structural modification of any building or structure, off-street parking spaces, either within or without a structure with adequate provision for ingress and egress, in accordance with the requirements contained in this Article. Except as otherwise provided, each parking space shall consist of a rectangular area ten (10) feet by twenty (20) feet.

(b) For any building or part thereof used for commercial, industrial, hospital or institutional purposes, adequate off-street parking space for loading and unloading shall be provided in such amount and at such locations as required by the Planning Commission at the time of site development plan approval, considering the size and proposed use of the building. Such space shall be in addition to other requirements contained in Section 24-213.

(c) No required parking area or loading space shall be used or permitted to be used for the sale, repair, dismantling or servicing of any vehicle, equipment, materials or supplies.

(d) Parking space as required in this Article shall be on the same lot with the main building or structure, or for buildings other than dwellings, located not more than three hundred (300) feet therefrom. Any parking space shown on a site development plan heretofore or hereafter approved by the Planning Commission which abuts the side or rear lot line, or faces the front of a lot in a residential zone, shall be screened from such lot by an earth berm, planting, a fence, a solid wall or a combination of two or more of the foregoing as specified by the planning Commission in approval of the site development plan.

(e) Interior driveways and entrance and exit driveways shall be at least twenty (20) feet in width to allow safe and expeditious movement of vehicles, entrance and exit driveways shall be separately provided wherever possible. Interior driveways for one way vehicular movement only may be reduced to not less than fifteen (15) feet.

(f) Where the angle between the center line of a parking space and the center line of the driveway serving it does not exceed sixty (60) degrees, the width of such space, perpendicular to the center line of such space, shall not be required to exceed nine feet. Any such space shall be marked by double parallel lines on each side thereof. If any parking area consists of spaces ten (10) feet wide or wider shall hereafter be redesigned to provide parking spaces less than said ten feet wide pursuant to this paragraph, the new design shall be first approved by the Planning Commission.

(g) All required parking spaces, access and circulation drives shall have a paved surface in accordance with the requirements of this Article. All off-street parking, loading and storage areas must be striped in a visible color. The Planning Commission, in addition may require in its approval of the site development plans, directional arrows and traffic signs on site as necessary for site traffic control.

(h) The last two feet of any parking space need not be paved; provided that either:

(1) the last two (2) feet shall overhang a monolithic concrete curb and the first two feet of any adjacent sidewalk seven (7) feet or greater in width; or

(2) the last two (2) feet shall overhang a concrete curb and a two (2) foot grass strip; and

(3) that the use of such non paved portion of the parking space will not interfere with nor injure existing or required shrubbery, landscaped or treed areas.

(i) No off-street parking lot, area or facility shall be reduced in area or encroached upon by buildings, structures or vehicular storage or any other use where such reduction or encroachment will reduce the area below that required by this Article.

#### Sec. 24-215. Parking requirement schedule.

##### (a) Special computation requirements.

(1) When any land or building is used for two (2) or more purposes, the number of parking spaces required shall be the sum of the requirements for various individual uses, computed separately in accordance with this Article.

(2) For the purposes of this Article, the number of employees shall be the average number of persons employed taking into consideration day, night and seasonal variations.

(3) For the purposes of this Article, "gross leasable area" is defined as the total floor area of buildings designed for exclusive tenant occupancy and use, including basements, mezzanines and all other floors measured between interior lines of outside walls and center lines of interior partitions.

(4) Restaurants shall be classified in this schedule as follows:

(a-1) High turnover, midday sitdown restaurants where at least ninety percent (90%) of food served is consumed on the premises, including, but not limited to cafeteria and self-service restaurants.

(b-1) Low turnover, evening sitdown restaurants where patrons order from a menu and consume food at the same table, and are served by a waiter.

(c-1) Carry out, drive-in or fast food restaurants where food is served in non-reuseable containers at a counter or window.

(5) Whenever in this Code any particular zone contains requirements for parking areas, or there are other provisions which vary from the provisions of this Article, the more restrictive requirement shall apply.

(b) Parking Schedule.

Off-street parking space shall be provided as follows:

<u>RESIDENTIAL</u>	<u>PARKING SPACES REQUIRED</u>
Single Family, and Two Family	2/DU (Dwelling Units)
Multiple Family Apartments and Apartment Hotels*	
Efficiency	1/DU
1 B.R.	1.75/DU
2 B.R.	2/DU
3 B.R. and larger	2.5/DU
	*Plus one space for each 400 square feet of assembly area provided.
Hotels,* Motels,* Tourist Cabins, Rooming and Boarding Houses	1/guestroom or rooming unit *Plus one space for each 400 square feet of assembly area provided.
Housing for elderly and/or handicapped	1/2DU's
Dormitories	1/3 residents
Townhouses	2.25/DU
<u>EDUCATIONAL AND RELIGIOUS</u> Churches, Synagogues or other places of worship	1/4 seats provided

Convents, Monastaries and Nunneries	1/10 residents
Educational institutions, private	
Elementary and Junior level	1/employee
Senior high level*	1/employee plus 1/10 Students
Colleges and Universities*	1/3 residents plus 1/employee plus 1/4 non-residents *Plus 1/4 seats provided for stadiums, auditoriums and assembly halls.
Trade schools and vocational instruction	Determined by Planning Commission at site Plan review
<u>CULTURAL AND RECREATIONAL</u>	
Arcades and amusement centres (indoor)	1/200 square feet of floor area
Athletic fields and tennis courts	1/10 persons in capacity
Botanical and Zoological gardens*	Determined by Planning Commission at site Plan review
Bowling alleys	4/lane
Commercial stadiums, grandstands and race tracks	1/4 seats provided plus 1/2 employees
Golf courses	Determined by Planning Commission at site Plan review
Libraries, museums, art galleries, and historical sites	1/400 square feet of gross floor area
Meeting halls, convention and exhibition halls	1/100 square feet of gross floor area
Private clubs and lodges	1/300 square feet of gross floor area
Recreational and community centers	1/80 square feet of gross floor area
Skating rinks and dance halls	1/100 square feet of floor area
Swimming pools (excluding private pools)	
Commercial	1/40 square feet of water surface area
Community	1/70 square feet of water surface area
Theatres (Drive-In)	10 percent over vehicle capacity
Theatres (indoor)	1/4 seats plus 1/employee
<u>HEALTH, WELFARE AND PHILANTHROPIC</u>	
Animal hospitals and kennels	1/400 square feet of gross floor area
Convalescent, Rest, Nursing homes, Sanitarium, care for aged and disabled	1/4 beds plus 1/employee

Hospitals	1/patient bed plus 1/2 employees plus 1/physician
Medical and dental offices clinics	1/200 square feet of gross floor area plus 3/medical practitioner
Philanthropic and Charitable Institutions	1/employee plus 1/400 square feet of visitors' floor area
<u>TRANSPORTATION, COMMUNICATIONS AND UTILITIES</u>	
Air, rail, motor and water freight terminals	1/2 employees
Airports, heliports and helistops	Determined by Planning Commission at site plan review
Cartage and express facilities	1/employee plus 1/vehicle maintained on site
Rail and bus passenger terminals	1/100 square feet of waiting area
Sewage treatment plants	1/employee
Public utility and service uses	1/employee
<u>MANUFACTURING, STORAGE AND WHOLESALE</u>	
Building material sales	1/employee plus 1/300 square feet of sales area
Mail order house	1/employee
Printing and publishing	1/employee
Production or processing of materials, goods or products	1/employee plus 1/vehicle stored on the premises plus 1/300 square feet of sales area
Temporary buildings for construction purposes	1/occupant
Testing, repairing, cleaning, servicing of materials, goods or products	1/employee
Warehousing and wholesaling	1/employee plus one/vehicle stored on premises
<u>COMMERCIAL ESTABLISHMENTS, RETAIL SALES, SERVICE, TRADE OR MERCHANDISING</u>	
Automobile and other motor vehicle sales	1/employee plus 1/600 square feet of gross floor area
Automobile and other motor vehicle repair, laundry and service stations	2/bay plus 1/employee
Automobile, truck and trailers rental	1/rental vehicle or unit plus 1/employee
Banks and financial institutions	1/300 square feet of gross floor area
Commercial establishments devoted to retail sales, service, trade or merchandising (except restaurants)	1/180 square feet of gross leaseable area devoted to retail sales, service, trade or merchandising and located on any floor of a building which may be entered approximately at grade  1/400 square feet of gross leaseable area devoted to retail sales, service, trade or merchandising and located on any floor other than that which may be entered approximately at grade.
Shopping Centers, Complexes or Malls containing more than 600,000 square feet of gross leaseable area	1/200 square feet of gross leaseable area devoted to retail sales, service, trade or merchandising and located on any floor of a building which may be entered approximately at grade  1/400 square feet of gross leaseable area devoted to retail sales, service, trade or merchandising and located on any floor other than that which may be entered approximately at grade.



Commercial greenhouses and  
nurseries

1/employee plus 1/300  
square feet of gross floor  
area plus 1/1000 square  
feet of outdoor sales area

OFFICES

Offices, general, business and  
professional (non-medical)

1/300 square feet of gross  
floor area

Offices, medical and dental

4/practitioner occupying  
offices plus 1/2 employees

ADDITIONAL USES

All uses not listed above shall be determined by Planning  
Commission at site plan review or prior to issuance  
of occupying permits.

Sec. 24-216. Construction, maintenance, screening, drainage,  
lighting requirements.

Every area hereafter constructed and maintained for  
off-street parking purposes shall comply with the following  
requirements:

(a) The minimum grade of such parking areas,  
including access and circulation areas shall be one and one-  
half percent (1 1/2%). The maximum grade of any such parking  
areas, including access and circulation areas shall be six  
percent (6%); provided however, this shall not prohibit drive-  
ways connecting one portion of a parking area to another from  
having a grade not exceeding ten percent (10%).

(b) Each parking lot or other non-structural off-  
street parking area shall be paved with two (2) inches of  
asphaltic concrete over a four (4) inch asphaltic base.

(c) Every parking lot or other off-street parking  
area shall be so designed, constructed and maintained that  
surface water will neither accumulate, except in accordance  
with an approved storm water management plan, nor damage or  
impair abutting properties and public streets.

(d) Lighting of off-street parking lots, areas and  
facilities shall be installed and maintained in a manner not  
to reflect or cause glare into abutting or facing residential  
premises, nor cause reflection or glare which adversely  
affects safe vision of operators of motor vehicles on adjoining  
streets and roads. Adequate lighting shall be provided if  
the parking lot, area or facility is to be used at night.  
Where such lighting now exists or is hereafter installed on  
poles or other structures within or adjacent to parking areas,  
said poles or structures shall be protected from damage by  
motor vehicles by curbs, posts or other installations designed  
to prevent such damage.

(e) Multiple-family, commercial or industrial  
parking lots hereafter constructed containing three hundred  
(300) or more parking spaces shall be divided into parking  
areas of not more than one hundred (100) cars each and shall  
be separated by landscaping, change of grades, structures  
or other natural or artificial means. Not less than five  
percent (5%) of the total parking lot or area shall be  
devoted to such internal landscaping and interior parking  
separation areas. This requirement shall be computed as  
part of any green area development requirement.

(f) The edges or perimeters of existing or hereafter installed parking areas having impervious surfaces shall be protected with curbs or wheel stops or some other installation so as to prevent vehicles from being driven over the edge or perimeter of the impervious surface.

(g) Every parking lot, area or facility shall be maintained in such a manner so as to prevent injury to persons or damage to property and further shall be maintained so as to prevent the accumulation of litter and debris.

(h) Multiple-family, commercial or industrial parking lots, areas or facilities existing or hereafter installed containing fifty (50) or more parking spaces shall contain thereon one (1) waste or trash receptacle for public use for each fifty (50) parking spaces.

Sec. 24-217. Parking for Handicapped.

All parking lots, areas or facilities hereafter constructed or enlarged shall provide parking for handicapped persons in accord with the requirements imposed in this section.

All parking lots, areas or facilities hereafter constructed or enlarged shall have a number of parking spaces, not to exceed five percent (5%) in grade, reserved for the physically handicapped, as set forth in the following table. Such spaces shall be identified by signs eight (8) feet above grade, stating "Handicapped Parking". Where such signs are placed flush against buildings or structures, or in other locations not accessible to vehicular or pedestrian traffic, a six (6) foot height may be permitted. Each reserved parking space shall be not less than twelve (12) feet wide. Where a curb exists between a parking lot surface and a sidewalk surface, an inclined curb approach or a curb cut with a gradient, where feasible, of not more than one (1) foot in twelve (12) and a width of not less than four (4) feet shall be provided for wheelchair access.

Total Parking Spaces in Lot	Required Minimum Number of Accessible Spaces
LESS THAN 9	0
10 - 25	1
26 - 100	2
101 - 300	4
301 - 500	6
501 - 800	8
801 - 1000	10
MORE THAN 1,000	TEN SPACES PLUS TWO SPACES FOR EACH ADDITIONAL THOUSAND, WITH A MAXIMUM LIMIT OF 20 SPACES.

Parking spaces for the physically handicapped shall be identified as specified in this section and located as close as possible to elevators, ramps, walkways and entrances. Parking spaces shall be located so as to provide handicapped persons with easy accessibility to a store, shopping center or other applicable building. Sidewalks shall be scored or otherwise textured to indicate to blind persons the location of doors. Storm drainage grates and similar devices shall not be located within the required means of access for the physically handicapped.

Sec. 24-218. Enforcement.

In the event of any failure to comply with the provisions of this Article:

(a) The Planning Commission shall deny approval of any submitted site development plan and no building permits shall be issued for any non-conforming development plan; or

(b) The Board of Appeals may revoke any special exception or variance where compliance with this Article is a condition of their approval; or

(c) The City Manager may order the closing of any parking lot, area or facility or part thereof and such order shall be enforceable by appropriate legal or equitable proceedings in a court of competent jurisdiction.

Notwithstanding anything to the contrary contained in this Article, the regulations set forth in Sections 24-212, 24-214 and 24-215 of this Article shall not apply with respect to single family and two family dwelling units.

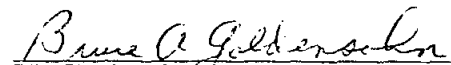
AND BE IT FURTHER ORDAINED as follows:

Sec. 24-161 is hereby repealed in its entirety.

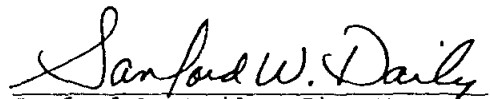
ADOPTED by the City Council this 17th day of March, 1980.

  
BRUCE A. GOLDENSOHN, MAYOR  
AND PRESIDENT OF THE COUNCIL

Delivered to the Mayor of the City of Gaithersburg, Maryland this 17th day of March, 1980. Approved by the Mayor of the City of Gaithersburg, this 17th day of March, 1980.

  
BRUCE A. GOLDENSOHN, MAYOR

This is to certify that the foregoing Ordinance was adopted by the City Council of Gaithersburg, in public meeting assembled, on the 17th day of March, 1980, and the same was Approved by the Mayor on the 17th day of March, 1980. This Ordinance will become effective on April 7, 1980.

  
Sanford W. Daily, City Manager

**Sec. 24-219. Parking requirement schedule.****(a) *Special computation requirements.***

- (1) When any land or building is used for two (2) or more purposes, and section 24-219(c) of this article is not applied, the number of parking spaces required shall be the sum of the requirements for various individual uses, computed separately in accordance with this article.
- (2) For the purpose of this article, the number of employees shall be the average number of persons employed taking into consideration day, night and seasonal variations.
- (3) Restaurants located within or as part of a retail center and which in the aggregate contain less than fifteen (15) percent of the gross leasable floor area of said center shall be considered retail uses and the parking requirement calculated on the basis of retail use. In all other cases, the computation of parking ratio requirements for restaurants that fall between any classification not listed below shall be determined at the discretion of the planning commission. Restaurants shall be classified in this section as follows:
  - a. *Class A:* High-turnover, midday. Sit-down restaurants where at least ninety (90) percent of the services are provided on the premises and all customer services to the patron are performed by a waiter or waitress at a table. There shall be at the time of occupancy of any such restaurant a minimum of thirteen (13) parking spaces for each one thousand (1,000) square feet of gross floor area within the establishment.
  - b. *Class B:* Carry-out, drive-in or fastfood restaurants where food is served in nonreusable containers at any counter or window. There shall be at the time of occupancy of such restaurant a minimum of sixteen (16) parking spaces for each one thousand (1,000) square feet of gross floor area within the establishment. Provided, however, food sales establishments containing less than one thousand (1,000) square feet of gross floor area within a shopping center or mall wherein not more than a single variety of prepared food is sold which does not require cooking or heating shall be deemed a commercial retail establishment and the parking requirements therefor shall apply.
  - c. *Class C:* Cafeteria-style restaurants where prepared foods are self-served and consumed on the premises at a table. There shall be at the time of occupancy of any such restaurant a minimum of sixteen (16) parking spaces for each one thousand (1,000) square feet of gross floor area within the establishment.
- (4) Whenever in this Code any particular zone contains requirements for parking areas, or there are other provisions which vary from the provisions of this article, the more restrictive requirement shall apply.

(b) *Parking schedule.* Off-street parking space shall be provided as follows:

***Residential***

***Parking Spaces Required***

Single-family and two-family	2/DU (Dwelling Units)
Multiple-family apartments and apartment hotels:*	
Efficiency	1/DU
1 B.R.	1.7/DU
2 B.R.	2/DU
3 B.R. and larger	2.5/DU
	*Plus one space for each 400 square feet of assembly area provided.
Hotels*, motels*, tourist cabins, rooming and boarding houses	1/guest room or rooming unit Plus one space for each 400 square feet of assembly area provided.
Housing for elderly and/or handicapped	1/2DU
Dormitories	1 per 3 residents
Townhouses	2.5/DU provided however that each garage space within townhouse developments shall be counted as one-half of a parking space.
Urban Cottage	
Unit Size	Dwelling Unit Count:
0 to 699 square feet	1.0/DU
700 to 899 square feet	1.75/DU
900 to 1200 square feet	2.0/DU
Bed and breakfast	1/guest room in addition to single-family residential requirement.

***Educational and Religious***

***Parking Spaces Required***

Child or elderly day care facilities accommodating more than eight (8) individuals	1½/employee
Churches, synagogues or other places of worship	1 per 4 seats provided
Convents, monasteries and nunneries	1 per 10 residents
Educational institutions, private	
Elementary and junior level	1/employee
Senior high level*	1/employee plus 1 per 10 students
Colleges and universities*	1 per 3 residents plus 1 per 3 employee plus 1 per 4 nonresidents
	*Plus 1 per 4 seats provided for stadiums, auditoriums and assembly halls.

*Educational and Religious*

Trade schools and vocational instruction

*Cultural and Recreational*

Arcades and amusement centers (indoor)

Athletic fields and tennis courts

Botanical and zoological gardens

Bowling alleys

Commercial recreation restaurants

Commercial stadiums, grandstands and race tracks

Golf courses

Libraries, museums, art galleries, and historical sites

Meeting halls, convention and exhibition halls

Private clubs and lodges

Recreational and community centers

Skating rinks and dance halls

Swimming pools (excluding private pools)

Commercial

Community

Theatres (drive-in)

Theatres (indoor)

*Health, Welfare and Philanthropic*

Animal hospitals and kennels

Convalescent, rest, nursing homes, sanitarium, care for aged and disabled

Hospitals

Medical and dental offices clinics

Philanthropic and charitable institutions

*Parking Spaces Required*

Determined by planning commission at site plan review

*Parking Spaces Required*

1 per 100 square feet of floor area

1 per 10 persons in capacity

Determined by planning commission at site plan review

4/lane

1 per 100 square feet of gross floor area devoted to amusement and recreation machines and devices; and 16 per 1000 square feet of gross floor area devoted to restaurant use

1 per 4 seats provided plus 1 per 2 employees

Determined by planning commission at site plan review

1/400 square feet of gross floor area

1/100 square feet of gross floor area

1/300 square feet of gross floor area

1/80 square feet of gross floor area

1/100 square feet of floor area

1/40 square feet of water surface area

1/70 square feet of water surface area

10 percent over vehicle capacity

1/4 seats plus 1/employee

*Parking Spaces Required*

1/400 square feet of gross floor area

1/4 beds plus 1/employee

1/patient bed plus 1/2 employees plus 1/physician

1/200 square feet of gross floor area plus 3/medical practitioner

1/employee plus 1/400 square feet of visitors' floor area

***Transportation, Communications and Utilities***

Air, rail, motor and water freight terminals  
Airports, heliports and helistops

Cartage and express facilities  
Rail and bus passenger terminals  
Sewage treatment plants  
Public utility and service uses

***Manufacturing, Storage and Wholesale***

Building material sales

Mail order house  
Printing and publishing  
Production or processing of materials, goods or products  
Temporary buildings for construction purposes  
Testing, repairing, cleaning, servicing of materials, goods and products  
Warehousing and wholesaling

***Commercial Establishments, Retail Sales, Service, Trade or Merchandising***

Automobile and other motor vehicle sales

Automobile and other motor vehicle repair, laundry and service stations  
Automobile, truck and trailer rental  
Banks and financial institutions  
Commercial establishments devoted to retail sales, service, trade or merchandising (except restaurants)

***Parking Spaces Required***

1/2 employees  
Determined by planning commission at site plan review  
1/employee plus 1/vehicle maintained on site  
1/100 square feet of waiting area  
1/employee  
1/employee

***Parking Spaces Required***

1/employee plus 1/300 square feet of sales area  
1/employee  
1/employee  
1/employee plus 1/vehicle stored on the premises plus 1/300 square feet of sales area  
1/occupant  
1/employee  
1/employee plus 1/vehicle stored on premises or 1/500 square feet of gross floor area plus 1/vehicle stored, whichever shall be greater.

***Parking Spaces Required***

1/employee plus 1/600 square feet of gross floor area  
2/bay plus 1/employee  
1/rental vehicle or unit plus 1/employee  
1 per 300 square feet of gross floor area  
1 per 180 square feet of gross leasable area devoted to retail sales, service, trade or merchandising and located on any floor of a building which may be entered approximately at grade, 1 per 400 square feet of gross leasable area devoted to retail sales, service, trade or merchandising and located on any floor other than that which may be entered approximately at grade.

*Commercial Establishments, Retail Sales, Service, Trade or Merchandising*

**Retail centers**

*Parking Spaces Required*

2.5 spaces per 1000 square feet of gross leasable area devoted to retail sales, service, trade or merchandising located on any floor other than that which may be entered approximately at grade.

4.5 spaces per 1000 square feet of gross leasable area in centers containing not more than 250,000 square feet of floor area devoted to retail sales, service, trade or merchandising.

5 spaces per 1000 square feet of gross leasable area in centers with more than 250,000 but not exceeding 400,000 square feet of floor area and centers with more than 1 million square feet of floor area devoted to retail sales, service, trade or merchandising.

5.5 spaces per 1000 square feet of gross leasable area in centers containing more than 400,000 but not exceeding 1 million square feet of floor area devoted to retail sales, service, trade or merchandising.

**Commercial greenhouses and nurseries**

1/employee plus 1 per 300 square feet of gross floor area, plus 1 per 1000 square feet of outdoor sales area

*Offices*

*Parking Spaces Required*

Offices, general, business and professional (nonmedical)

1 per 300 square feet of gross floor area

Offices, medical and dental

4/practitioner occupying offices plus 1 per 2 employees.

Provided, however, an office for mental health practitioners including, but not limited to, psychologists, psychiatrists and therapists, containing less than 2,000 square feet of gross floor area and having no more than 2 full-time practitioners, shall be deemed general office use and the parking requirements therefor shall apply.



*Additional Uses*

*Parking Spaces Required*

All uses not listed above shall be determined by planning commission at site plan review or prior to issuance of occupying permits.

(c) *Shared parking for developments containing a mix of uses.*

- (1) When any land and/or buildings are contiguous to one another, and are used for two (2) or more purposes, the number of parking spaces shall be computed by multiplying the minimum appropriate percentage, as shown in the following parking credit schedule for each of the five (5) time periods shown. The number of parking spaces required for the mixed use development is then determined by adding the results in each column. The column total that generates the highest number of parking spaces becomes the parking requirement.

Use	Weekday		Weekend		Night Time
	Day	Evening	Day	Evening	Mid-
	6 a.m.-6 p.m.	6 p.m.-Midnight	6 a.m.-6 p.m.	6 p.m.-Midnight	night-6 a.m.
Industrial/office/warehouse	100%	10%	10%	5%	5%
General retail	60%	90%	100%	70%	5%
Hotel/motel	75%	100%	75%	100%	75%
Class A restaurant	50%	100%	100%	100%	10%
Class B restaurant	100%	100%	100%	100%	10%
Class C restaurant	50%	100%	100%	100%	10%
Commercial recreation establishment and theatres	40%	100%	80%	100%	10%
All other	100%	100%	100%	100%	100%

- (2) The following conditions shall apply to any parking facility for a development containing a mix of uses:
- a. The mixed use property and shared parking facility must be owned by the same developer/owner or must be the subject of a recorded shared parking agreement made between different owners of the properties involved. Any changes to the agreement must be approved by the planning commission. There can be no greater than five hundred (500) linear feet, measured along the most appropriate walking route between the shared parking facility and the entrance to the establishments being served. Shared parking facilities located on a separate lot from the establishments being served must meet the requirements of section 24-218(d) of this article.
  - b. Parking for the handicapped may not be shared or included in any shared parking calculation.
  - c. The city planning commission shall determine at the time of site plan approval that shared parking is possible and appropriate at the location proposed.

Particular attention is needed to assure that sufficient and convenient short-term parking will be available to commercial establishments during the weekday daytime period. The shared parking spaces must be located in the most convenient and visible area of the parking facility nearest the establishment being served.

- d. All subsequent requests for use and occupancy for an approved shared parking development must be reviewed by the planning department in order to determine if there is a substantial change in use which would require the new use to be approved by the planning commission after finding that sufficient parking will be available for the new use.
- e. A parking facility, for the purposes of this article, is defined as a surface parking lot or group of lots, a parking structure or garage.

(Ord. No. O-13-80; Ord. No. O-10-81, § 9, Ord. No. O-15-81; Ord. No. O-17-82, § 3; Ord. No. O-14-83, § 2, 7-18-83; Ord. No. O-9-85, § 2, 8-5-85; Ord. No. O-20-87, 9-8-87; Ord. No. O-12-89, 9-5-89; Ord. No. O-5-93, 4-12-93; Ord. No. O-6-93, 4-19-93; Ord. No. O-17-93, 11-15-93)

**Sec. 24-220. Construction, maintenance, screening, drainage and lighting requirements.**

Every area hereafter constructed and maintained for off-street parking purposes shall comply with the following requirements:

- (a) The minimum grade of such parking areas, including access and circulation areas, shall be one and one-half (1½) percent. The maximum grade of any such parking areas, including access and circulation areas, shall be six (6) percent; provided, that this shall not prohibit driveways connecting one portion of a parking area to another from having a grade not exceeding ten (10) percent.
- (b) Every parking lot or other nonstructural off-street parking area shall be paved in accordance with one of the following standards, as deemed appropriate by the city manager or his designee:
  - (1) Two (2) inches of bituminous concrete surface course over a four-inch bituminous concrete base course of an approved subgrade; or
  - (2) One and one-half (1½) inches of bituminous concrete surface course over three (3) inches of bituminous concrete base course over six (6) inches of crushed stone graded aggregate base course on an approved subgrade; or
  - (3) Other materials or construction methods which are demonstrated to the satisfaction of the city manager or his designee to be the equivalent of the standards referred to in (1) and (2) of this subsection.
  - (4) The standards set forth above shall be applied in the following manner:
    - a. The thickness of bituminous concrete or crushed stone courses stated in the standards shall be the minimum thickness acceptable.